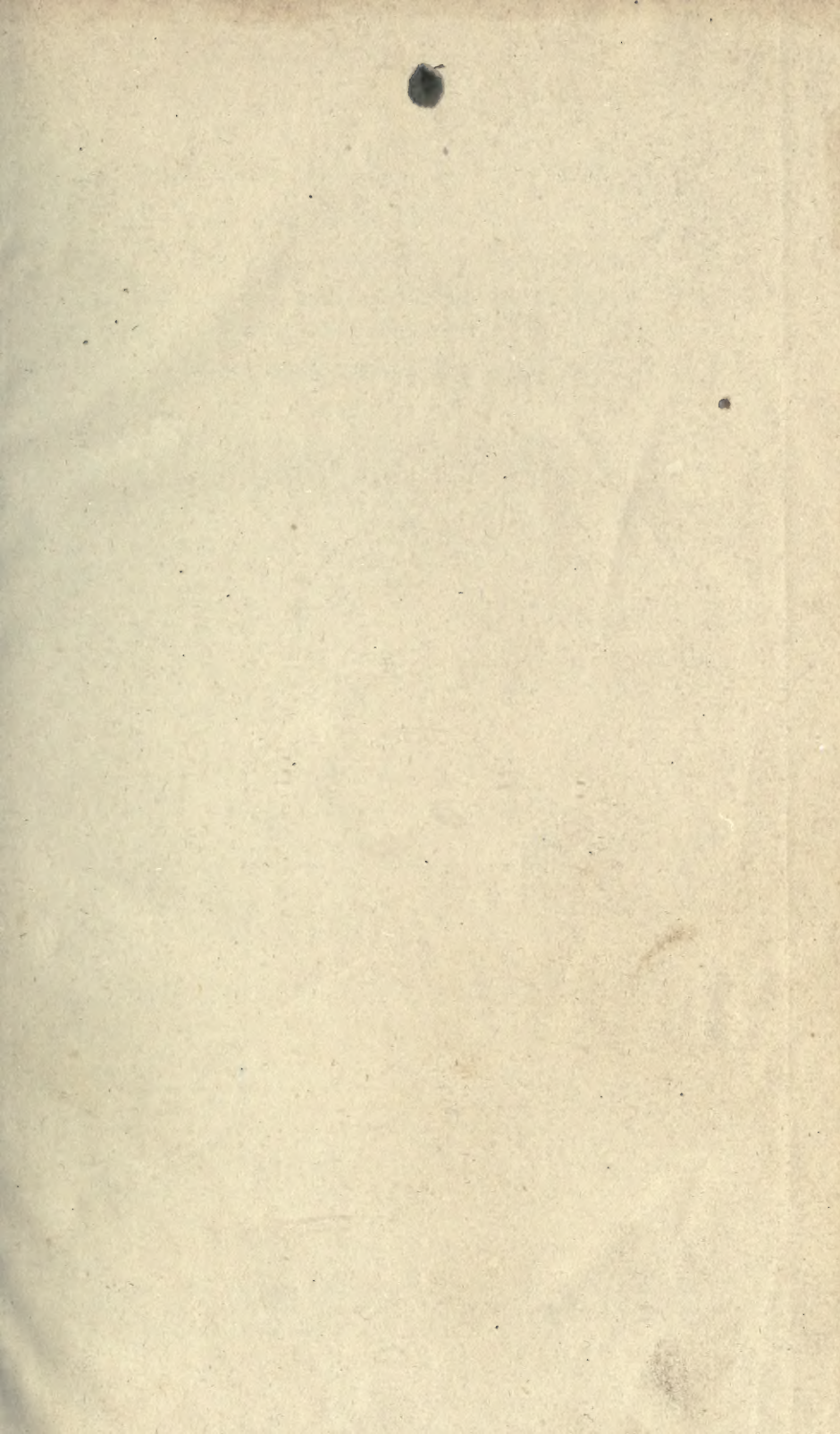
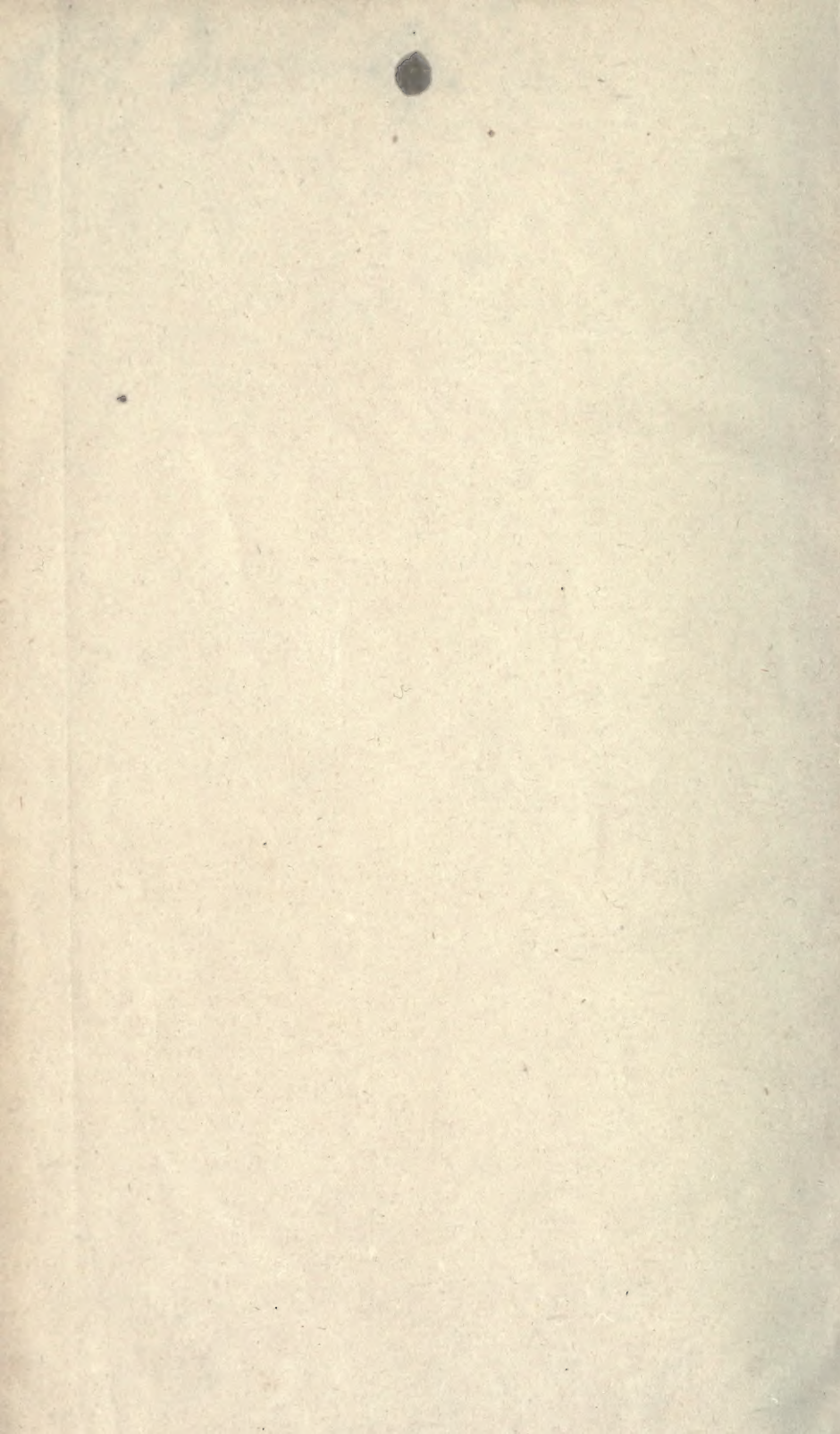



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INTRODUCTION

TO

AMERICAN LAW,

DESIGNED AS A

FIRST BOOK FOR STUDENTS.

BY TIMOTHY WALKER,

LATE PROFESSOR OF LAW IN THE CINCINNATI COLLEGE.

SECOND EDITION, ENLARGED AND AMENDED.

CINCINNATI,
PUBLISHED BY DERBY, BRADLEY & CO.
1846.

INTRODUCTION



FIRST BOOK FOR STUDENTS

Entered according to act of Congress, in the year 1844,

BY TIMOTHY WALKER,

In the office of the Clerk of the District Court of the District of Ohio.

1844
- 3/12/91

TO THE
HONORABLE JOSEPH STORY,

WHO EQUALLY ADORNS AND ILLUSTRATES AMERICAN JURISPRUDENCE IN
THE SEVERAL CAPACITIES OF

JUDGE, AUTHOR AND TEACHER,

IN EACH OF WHICH HE HAS NO SUPERIOR, THE FOLLOWING HUMBLE
EFFORT TO PREPARE THE WAY FOR MORE READILY
APPRECIATING HIS VAST AND VARIOUS LABORS,

IS MOST RESPECTFULLY INSCRIBED,

BY ONE WHO HAS ENJOYED THE GOOD FORTUNE OF BEING

HIS PUPIL AND FRIEND.

PREFACE,

TO THE FIRST EDITION.

ACCORDING to the custom of the times, a preface usually takes the form of an apology for adding to the multitude of books; and I shall so far comply with this custom, as to explain my reasons for making this publication.

While pursuing my legal studies, I found myself much in the condition of a mariner without chart or compass. I experienced at every step the want of a first-book upon the law of this country. I felt that much time would have been saved, if I could have commenced my course with a systematic outline of American, instead of English law; for as the two systems differ in nearly as many points as they correspond, and as I had no means of distinguishing between the applicable and the inapplicable, I necessarily acquired many false impressions, the more difficult to be subsequently corrected, because they were first impressions. In a word, I came to the conclusion that fewer facilities have been provided for studying the elementary principles of American jurisprudence, than for perhaps any other branch of useful knowledge.

And these results of my experience as a student, have acquired additional confirmation from my experience as a teacher. In the year 1833, I became connected with the Cincinnati Law School, at first a private institution, but afterwards a department of the Cincinnati College; and here I was hourly called upon to remove the doubts and difficulties, which I had myself encountered. In order to do this in the most convenient and effectual manner, and without a thought of publication, I commenced the preparation of the following lectures, which I read to the students, as an introduction or accompaniment to the usual course of legal study. Such being my object, I endeavored to be clear and simple, rather than to seem profound or erudite; and instead of attempting to give a complete exposition of any single

branch of law, I sought to bring together all the various branches, and present them to view under a comprehensive but systematic outline, which would exhibit their general bearings and relations only, and not their particular details; but at the same time, in connection with each successive topic, I mentioned the books containing more detailed information.

Such briefly were the views with which these lectures were prepared; and I now publish them under a belief that they will be useful to two classes of persons; namely, first, those who are beginning a course of professional study, and require something in the nature of a guide-book; and, secondly, those who desire to obtain some general notions of the law, as an important part of practical education, but do not intend to pursue it as a profession. Whether this belief be well founded or not, experiment only can determine. If not, as my aim has been utility only, and not fame, so my failure will only occasion regret, and not mortification. I have, however, been induced to hope for a happier result, from the favorable opinion almost unanimously expressed by the students to whom these lectures were read, and who may be presumed to be the best judges of what will satisfy their own wants; and also from the approbation expressed by several distinguished professional gentlemen, to whom I submitted the manuscript, and in whose judgment and candor I have the utmost confidence. I mention these facts to show that I have not acted rashly or unadvisedly; but not to make others responsible for my errors. If I have been guilty of adding one more to the catalogue of useless books, as mine has been the presumption, let the censure rest on me alone; and I will no further deprecate criticism, or implore mercy, than by asking those, who may pass judgment upon my efforts, to keep my purpose distinctly in view. Let it be remembered that I have written for beginners only, and not for adepts; that I have made no pretensions to deep professional lore; that this book does not propose to supersede other elementary books, but only to prepare the way for them; and that I seek no other praise than that of usefulness.

If an author may be allowed to express an opinion in his own case, I would say that the chief merits of this book will be found to consist in perspicuity and condensation. As to originality, unless it be in the arrangement and modes of illustration, it does not belong to such an undertaking; but it is proper to say, that I have quoted very sparingly the language of other writers, and never without giving credit. I have, moreover, scrupulously avoided giving long abstracts of cases, though this is a very convenient method of making or amplifying law books. In a word, I have crowded as many general principles as I could, into

the smallest compass compatible with clearness; and to this end, I have sought to use just such and so many words as would express my meaning, and no more. Believing that the language of a law book should be seen through, rather than looked at, I have made no attempt at what is called fine writing; but have used as much plainness and familiarity of speech, as the exceedingly technical character of the subject would permit. Indeed, what other fault soever may be found, professional pedantry will not be imputed to me.

But I have entitled this book, an Introduction to American Law, and I may be called upon to vindicate the propriety of this title. I confess then, that in some minor respects, it may not be equally adapted to all parts of the Union; but my excuse is, that without being ten times as large as it is, it could not have been made so. If I had possessed the knowledge, I could not, within any reasonable compass, have referred to the local law of twenty-six different states; and yet local references were occasionally necessary, in order to exhibit an entire system. I was compelled, therefore, in such cases, to make choice of some particular state; and I naturally selected that state in which the lectures were read. But these local references, in an outline so general as this, are not so frequent as to detract materially from the general adaptation of the book, to students in other states; and in case of diversity, the necessary corrections can be easily made. At all events, the diversity is less between the different states, than between any one state and England; and therefore something is certainly gained even on the score of general adaptation.

And here let me anticipate an objection of another sort. It may be said, that in attempting to teach what the law is, I have dwelt too much upon what I think it should be; or, in other words, that in a work professedly didactic, I have speculated too much upon projects of reform. To this objection I have two answers. In the first place, I have never undertaken to show what the law ought to be, without first stating what it is. While therefore the primary end of instruction is obtained, the mind of the student is at the same time excited to compare, examine and discuss the principles in question; and thus impress them the more deeply upon his memory. And in the second place, if the suggestions I have ventured to make be sound, they cannot be made too early, because bad laws are the very worst of bad things; and if these suggestions be not sound, they can do no harm, because the antidote accompanies the bane; nay the provision complained of will inspire increased confidence in the mind of the student from having been unsuccessfully assailed. But I cannot help believing that many of the proposed alterations would be decided improvements;

and in that belief, I have been anxious to present them to minds unhackneyed by custom, and therefore the more fitted to examine them without prejudice. I confess myself sanguine on the subject of legal reform; but I trust that I have no where pressed such considerations in an improper spirit.

Such then are the prefatory explanations which I have deemed it proper to make. That a book like that which I have endeavored to furnish, is very much wanted, all will agree. How far my execution has corresponded with my design, it is for my readers to decide. I cannot but wonder, as well as regret, that the task has not long since been performed by abler hands; for it is well worthy of the very ablest. Why has not some distinguished lawyer, after retiring from the more active labors of his profession, added one more laurel to his brilliant wreath, by embodying, in an enduring form, for the instruction of those who are to come after him, the matured results of wisdom and experience? A complete exposition of American Law, by such a man, whose very name would command respect and confidence, would be a glorious liquidation of that debt, which every great lawyer is said to owe to his profession; but such a benefactor has not appeared. The American Blackstone is yet to be desired; otherwise, the author of the following pages, without the age, learning or experience, which qualify him to speak with authority, and wholly unknown to fame, would have had no apology for attempting to instruct even beginners, in the noble science which so many illustrious men at this moment adorn.

Cincinnati, Feb. 25, 1837.

PREFACE,

TO THE SECOND EDITION.

My original purpose in publishing this book is fully explained in the former preface. In the present edition, I have made such alterations and additions, as experience taught me to believe would increase the usefulness of the work. Upon some of the more important topics, I have given, in the notes, an abstract of the leading cases. Upon others, I have enlarged the text. In the department of Constitutional Law, I have availed myself of the new light derived from the Madison Papers. I have added two lectures upon International Law. I have made the Law of Procedure more intelligible, by annexing the most approved forms. And I have thrown into the Appendix the text of our fundamental law, together with a catalogue of the most important books. The first edition was received with far more favor than I had a right to expect; and I think I may venture to assure the public, that the second is a decided improvement upon the first.

T. WALKER.

Cincinnati, Oct. 1, 1844.

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INTRODUCTION TO AMERICAN LAW.

PART I.

PRELIMINARY CONSIDERATIONS.

LECTURE I.

STUDY OF THE LAW. (a)

§ 1. *Difficulties to be overcome.* The course of lectures to which this is introductory, is intended to comprehend the rudiments of American law. I say *rudiments*, because I am persuaded that nothing beyond principles strictly elementary, can be profitably presented in the form of lectures. The almost infinite variety of details into which this science runs, can only be learned by a laborious examination of books, and an assiduous attendance upon courts. The attempt to embrace them in lectures, would only confuse the memory of the hearers. To me, the task would be endless; to you, comparatively useless. I shall have accomplished all I propose to myself, if I can furnish you with a general chart of the long voyage upon which you are about to embark. Accordingly the views I shall present will always be general, and sometimes, unavoidably superficial. They will be outlines merely for you to fill up by your own investigations. I shall endeavor to imbue you with the spirit and philosophy of law, as a science, consisting of principles arranged into a system. I shall commence and proceed throughout, upon the supposition that you are beginners only, and not adepts. I shall consider you as having one of two objects in view; either to make the law a regular profession, or to acquaint yourselves with its elements as a part of general education. It is matter of surprise as well as regret that the

(a) See the first section of Blackstone's Introduction; Warren on the Study of the Law; Hoffman's Course of Legal Study; an Essay prefixed to Anthon's Blackstone; and a recent work entitled Law and Lawyers.

number of persons of the latter description is not greater. But I trust, that public sentiment is changing on this subject. I think I perceive a manifest tendency towards a more general acquisition of legal information among persons who never design to be professional lawyers ; and I rejoice at the prospect ; for there is no branch of knowledge so essential to the proper discharge of the various duties of a citizen. This is especially true with respect to American citizens, whose high prerogative it is, by virtue of the doctrine of universal suffrage, to have a direct and personal participation in all public affairs. Surely that man is not fit to be the maker or the guardian of laws, who has never been educated in their first principles. But apart from public and patriotic considerations, self-interest should induce every man to understand his own rights and obligations. This proposition is almost too clear to need enforcement. As the *subjects* of law, certainly, if not as the *makers*, all ought to know enough to avoid its penalties, and reap its benefits. Unquestionably, on the score of practical utility, no kind of knowledge can stand higher ; for it comes into immediate application, almost every hour we live. And yet how little provision has hitherto been made, in our seminaries of learning, for this so important department of instruction ! The reasons commonly assigned for its neglect, are chiefly predicated upon the difficulties of teaching law in an easy and popular manner. Some of these difficulties are worthy of a brief notice, because they apply equally to professional teaching. They have reference principally to the language of the law, to the want of suitable books, and to the peculiar nature of the science.

First, the language of the law is the subject of much complaint. (a) No doubt it is obnoxious to the charge of unnecessary technicality. But it shares this reproach in common with every science of ancient date. There has always been a disposition in the votaries of learning towards exclusiveness. They have sought to create a monopoly of their acquisitions, by employing a language not generally understood, nor easily acquired ; and when a phraseology, however barbarous or inelegant, has been consecrated by time, it is very difficult to change it. The old law language was in fact a jargon compounded of three distinct languages. From the date of the Norman Conquest to 1063, legal proceedings were conducted, recorded, and reported in Norman French, (b) itself a mixture of French and Saxon. A statute of that year required them to be conducted in English, and recorded in Latin ; but for some time after they continued to be reported in French. With the exception of a few years during the protectorate of Cromwell, the records continued to be in Latin until 1730 ; when an act of

(a) See 3 Black. Com. 317.

(b) A Dictionary of this language has recently been prepared by *Kelham*, which has been annexed to Bouvier's Law Dictionary.

Parliament required them to be in English. Yet two years after, it was found necessary to enact that the *technical terms* of the law might still remain in their original language, whether French, Latin, or Saxon; and so they have continued to this day. Some of them are indeed incapable of a convenient translation. But the number is very small, consisting chiefly of the names of legal proceedings; and it may be safely affirmed that one can become a profound lawyer, without a general acquaintance either with French or Latin. These will serve for embellishment, but our own mother tongue is all that is indispensable. It is time that this should be generally understood; and that efforts should be made on all hands, to simplify the language of the law so as to make it level to the comprehension of all. The same overpowering reasons which opened the Scriptures to the laity in their vernacular tongue, should operate to make human laws intelligible to every inquirer. There would then be no plausibility in the objection, that it takes so long to learn terms, that little time is left for principles. And in conformity to these views, I shall avoid foreign terms as much as possible. Indeed it ought to be a maxim with every man, not only in reference to the law, but to every kind of knowledge, never to use a foreign word, when a native one will express the idea as well.

Secondly, a serious impediment is found in the want of *American treatises*, adapted to popular instruction. This is no small obstacle even to the professional student. There is no work on American Law, at all suitable for a *first book*; and we are compelled, for want of such a work, to commence with Blackstone's Commentaries on *English law*, to learn the rudiments of *American law*. This admirable book was first published in 1765. Prior to that time, the elements of what we now call *Jurisprudence*, existed only in a rude and undigested mass. Some efforts had indeed been made to bring order out of this confusion; but with small success. Sir Matthew Hale had published his "Analysis of the Law," for the purpose of showing, to use his own words, "that it was not altogether impossible, by much attention and labor, to reduce the laws of England into at least a tolerable method." Thomas Wood had also published his "Institutes;" in which he speaks of the law as "a heap of good learning, which he hoped it would not be impossible to sort and put into some order." This very guarded manner, in which these pioneers in the great work, venture to hint at the possibility of reducing the scattered elements of law to something like order, significantly indicates the wretched condition of the study at that time. But a more striking view is presented by the following abstract of Lord Chief Justice Reeve's direction for the first stage of legal inquiry. "Read Wood's Institutes cursorily, and for explanation of the same, Jacob's Law Dictionary. Next strike out what lights you can from Bohun's Institutio Legalis, and Jacob's Practising Attor-

ney's Companion, and the like ; helping yourself by indexes. Then read and consider Littleton's Tenures without notes, and abridge it. Then venture upon Coke's Commentaries. After reading it once, read it again, for it will require many readings. Abridge it ; common-place it ; make it your own ; apply to it all the faculties of your mind. Then read Sergeant Hawkins to throw light on Lord Coke. Then read Wood again to throw light on Sergeant Hawkins. And then read the statutes at large, to throw light on Wood." (a) When such were the miserable facilities for legal education, the scene all at once changed ; and from a repulsive mass of disjointed fragments, the law suddenly became a connected and methodical science. This transformation was effected by the comprehensive knowledge, luminous method, and beautiful style of Sir William Blackstone. There is probably no branch of knowledge, towards the perfecting of which a single mind has accomplished more. Sir William Jones justly pronounces the Commentaries "an incomparable work, and the most correct and beautiful outline that has ever been exhibited of any human science." But it is needless to multiply encomiums, because there have never been two opinions on the subject. Time, which consigns so many works to oblivion, does but add to the reputation of this. As a *first book* on the law, as a philosophical outline, serving the same purpose in the study of law, as a general map does in the study of geography, it still remains without a rival. Yet this work, admirable as it is, was written for *English students* ; and of course contains much that is inapplicable to this country. The American student, who reads it without a guide, obtains many erroneous impressions, and much useless learning. We have innovated upon the institutions of our English ancestors, with an unsparing hand ; and not merely in minute details, but also in fundamental principles. We cannot therefore find in Blackstone, an accurate outline of American law. Our great desideratum is, a work which would be to us, precisely what that work is to the English. And that man would be a great public benefactor, who should *americanize* Blackstone's Commentaries ; that is, who should give this work with just such additions, omissions, and corrections, as would make it an accurate exposition of American law ; or, what were still better, who should equal the style and manner of Blackstone, in an original work, upon the laws of his own country. But among the various obstacles in the way of such an enterprise, there is one, which, if not insurmountable, is certainly formidable. I refer to the great diversity of state laws. This renders it almost impossible to prepare a work of any reasonable compass, which shall be equally adapted to every part of the United States ; and yet sufficiently full and complete, to answer the end proposed. On this

(a) See Quincy's Dedication Address at the Dane Law College, 9 Am. Jurist, 53.

account, the efforts hitherto made by Judge Swift of Connecticut, in his *Digest* of the laws of that state; by Judge Tucker of Virginia, in his *Notes to Blackstone*; and by Judge Wilson of Pennsylvania, in his *Lectures*, have failed to be as generally useful, as their great merit would otherwise make them. The works of Professor Hoffman of Maryland, including his *Legal Outlines*, and his *Course of Legal Study*, form an exception to this remark, being very general in their character. So too the very learned Commentaries of Chancellor Kent, are almost equally applicable to all parts of the Union. But this work was not designed by its author for a first book. It presupposes some elementary knowledge both of terms and principles.

Thirdly, the two obstacles I have been describing, may, perhaps, be regarded as temporary in their character, and such as time will either greatly diminish, or wholly remove. But there is one permanent cause, which must ever render a thorough mastery of the law an arduous undertaking. And this is found in the nature of law as a study. I shall not here attempt to give you an accurate definition of law. Not less than twenty have been proposed, with each of which, hypercriticism might perhaps find some fault. (a) But thus much may be safely said—the term *Law*, though used in a great variety of relations, always means an *established rule*. Thus, whether we speak of the laws of God or of man, of matter or of mind, we uniformly refer to those established rules of action or operation, which belong to the subject-matter in question. And it was in this comprehensive sense, that Hooker spoke of law, when he said—“Her seat is the bosom of God, and her voice the harmony of the world; all things in heaven and earth, do her homage; the very least as feeling her care, and the greatest as not exempted from her power.” But our inquiries relate only to that class of laws which are denominated *municipal*; and which comprehend the *established regulations of political society*. And it was of law in this sense, that Burke spoke, when he called it—“the pride of the human intellect, and the collected wisdom of ages; combining the principles of original justice, with the boundless variety of human concerns.” Blackstone also describes it as “a science which distinguishes the criterions of right and wrong; which teaches to establish the one, and to prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice, the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community.” Nor can such language be deemed extravagant; for municipal law is indeed the grand regulator of human affairs. Its functions may be appropriately compared to those of gravitation. If you could imagine even a mo-

(a) 1 Hoffman's *Legal Outlines*, 252.

mentary suspension of that great law which regulates the universe of matter, keeping the minutest particle, as well as the mightiest mass, in its proper condition, the stupendous confusion which would thence result, and which we designate by the fearful name of *chaos*, furnishes a strong but faithful illustration of that social disorder, which would as certainly result from the suspension of municipal law, and which we designate by the hardly less fearful name of *anarchy*. It is to be remembered, also, that just in proportion as society advances in civilization, the importance of municipal law becomes greater, and its functions more complicated. Barbarians need few laws, because they have few interests to be regulated by law; but every step in the progress of improvement gives occasion for adding to the body of law some new provision, until the aggregate becomes formidable to the boldest mind. What could once be written upon ten or twelve tables, anon spreads over thousands; until the practice of law becomes a distinct avocation; and a thorough comprehension of all its infinite details requires the labor of a long and industrious life. Moreover the *criteria* of law, are not like those of other sciences. When the question is, what is the law regulating a given matter? it resolves itself into two others—who has the law making power in reference to this matter?—and what has this power in fact ordained? Now you cannot, as in natural science, resolve these questions by analysis or induction. You cannot apply to them the principles of mathematical demonstration. They cannot be reached by reasoning *a priori*. Nor can you, as in ethics, appeal to the monitor within. Conscience may inform you what the moral law is, and what the municipal law ought to be; but it might greatly mislead you as to what the municipal law actually is. To determine this, you must search the voluminous records of law, until you find the positive regulation; in which constant searching, chiefly consists the labor of a lawyer. And this leads me to speak of the sources from which our knowledge is to be obtained.

§ 2. *Sources of legal knowledge.* (a) A stranger to our institutions, might think that a knowledge of our law could be easily obtained by a diligent perusal of the *statutes*. Adverting to the beautiful theory of our social system, according to which a legislature is provided to make the laws necessary for our government, he might naturally conclude, that the acts of this legislature would comprise the entire body of our law, with the exception of what is embraced in our constitutions and treaties. Finding in these constitutions no other law-making power than the legislative department, the inference would be, that we have no other laws than our legislative acts. Were this the fact, the law would

(a) See a Catalogue of a Select Law Library, and a List of American and English Reports, in Appendix, No. 6.

indeed be a simple study. Could our whole law be found in our statute books, we might dispense with law schools, and almost with lawyers. In ordinary cases, every man might find for himself the law he wished to know, by a good index to the statute book. But what would that stranger say, if I should tell him, that although in our theory the legislature makes our laws, yet in fact, our legislative acts do not contain, perhaps, a fiftieth part of the law which governs us! I doubt not that he would be amazed at this discrepancy between our theory and practice. Yet nevertheless it exists. No where in this country is there to be found anything approaching to a complete code of statute law. But on the contrary, until very recently, those who have proposed measures for enlarging our codes, and thus gradually advancing them towards completion, have been sneered at, by the profession, as visionary schemers; and the consequence is, that up to this moment, the people of the United States are contented to live under a system of law, only a small portion of which has ever received an express legislative sanction. Hence we have a science embracing such a vast compass of study; so much of doubt and uncertainty; such a singular mixture of formality and technicality; so many curious yet convenient fictions; and, at the same time, so many astonishing specimens of acute discrimination and profound logic; that when, by the persevering toil of years, we have at length climbed up into "the gladsome light of jurisprudence," we need feel no apprehension, lest every man should undertake to become his own lawyer. I would not of course be understood as saying that the most perfect code of statute law would render our profession entirely unnecessary; though it is quite evident, that, by rendering the acquisition of the law more simple and expeditious, it would tend to diminish the importance which at present attaches to this profession. But whence, then, comes the main body of our law? and where is it to be found? I will endeavor briefly to answer these questions.

First, there is what we call the *common law*. This is a vast collection of judicial precedents, commencing with the earliest glimmerings of English history, accumulating there up to the period of colonizing this country, brought over the ocean by the first colonists, and here again accumulating up to the present moment. These precedents are contained in some hundreds of volumes of *Reports*, embracing the decisions of the English and American courts; which decisions have again been condensed, digested, abridged, and commented upon, in some hundreds of volumes more, for the convenience of the profession.

Secondly, there is the system of *equity or chancery law*, which had its origin in the early deficiencies of the English statutory and common law. This, like the other, consists of judicial precedents, running through nearly the same lapse of time, and contained in similar, though not quite so many repositories. In

round numbers, the books containing the common and chancery law, including *reports*, *digests*, *abridgments*, and *commentaries*, may be set down at about twelve hundred volumes. (a)

Now, even if all these precedents were of the same binding force as legislative acts, so that when you had once found a principle decided, you might rest upon it as unquestionable law, it would still be a Herculean labor to master the contents of so many volumes. But this is not the fact. When you have found a precedent to suit your case, you must look downward through all subsequent reports, to ascertain whether it has not been over-ruled. For to avoid the evil of being bound absolutely by precedents settled some hundreds of years ago, under an entirely different state of society, judges have been under the necessity of treating prior decisions, rather as lights to inform their judgment, than as imperative rules to govern their decisions. And hence the proverbial uncertainty of the law. In the first place, you may not find the precedent you want. If you do find one, it may turn out to have been over-ruled. And if not yet over-ruled, you have no assurance that it will not be over-ruled in the very case before you. (b) To say nothing, then, of the imperfection of human language, which occasions ambiguity in written, as well as unwritten law; or of the thousand points where law and equity come in contact with each other, making it difficult to determine to which jurisdiction a given case belongs, there is enough in the very nature of common and chancery law, as above explained, to try the strength and task the patience of the strongest and most resolute mind. To most of the sciences you may discern some limits, some stage, at which the mind may repose upon its acquisitions as complete. But to jurisprudence, as at present constituted, I know not where the limits are.

These things are not said to discourage you, but rather to excite your emulation at the prospect before you. Knowing what you have to go through, you will the better nerve yourselves at the outset. You cannot expect to become accomplished lawyers in the short period usually assigned in this country to a legal novitiate. It is obvious that if you would be in any measure prepared, in so short a time, to begin the practice, you must confine your studies to the most practical subjects. You cannot indulge in black-letter lore. The antiquities of the science must be reserved for that future leisure, which every young lawyer may be sure to find. It may well be doubted, whether a longer term of preparation would not, on the whole, be better for the

(a) On the subject of legal bibliography, see Hoffman's *Course of Legal Study*; Anthon's *Preliminary Essay to Blackstone*; the 22d and 23d Lectures of Kent; a Catalogue of a Select Law Library, and a List of American and English Reports, in Appendix, No. 6.

(b) See Greenleaf's *Cases Over-ruled*, a very important book to the legal practitioner.

profession. In the early days of Rome, we are told that all her youth were required to learn the twelve tables by heart, as an indispensable part of education. In later times, when the laws became more numerous, five years were devoted to their study. And this custom still prevails in all of the European universities, where the Roman or civil law is taught. As to the study of the English law, its history is briefly this. Up to the twelfth century, the clergy were the only lawyers. But when the Great Charter made one of the principal courts stationary at Westminster, which had before followed the person of the king, an important change took place. Lawyers began to congregate in the vicinity of this court, and a strong spirit of association was the natural result. This was fostered by the resolute Saxon opposition to the influence of the Norman clergy, who had exerted themselves to fasten the Roman law upon the English people. The result was, that the lovers of the English law united in purchasing for their accommodation, several houses in the vicinity of the court, which, belonging to the nobility, were then called hotels or *inns*. In these inns, they gradually formed themselves into collegiate bodies; and though never incorporated, the old writers speak of them as judicial universities. They were of two sorts; *inns of chancery*, for the younger students; and *inns of court*, for those more advanced. The king took them under his protection, and prohibited instruction in the English law to be given anywhere else. In a short period, we are told that the number of students amounted to two thousand. The regulations of these inns were numerous and minute, embracing the diet, dress, and whole deportment of the students; and, although purely conventional, and without any legal sanctions, they were rigorously enforced, and singularly efficient. If you are at all curious on this subject, you may derive much amusement from reading *Dugdale's Origines Juridiciales*, or *Cunningham's Antiquities of the Inns of Court*; where you will find a full account of these regulations. Suffice it for me to say, that the students were surrounded by a constant atmosphere of law for seven or eight years, at least, before they could be called to the bar. Their promotion was through several successive degrees not known in this country; and there was every thing to excite their emulation. In a word, they enjoyed, in perfection, all the advantages of social, over solitary study. Even the most indolent, could not reside there for the full period, and undergo the discipline of the place, without acquiring an immense amount of legal information. In this country, we have no such institutions. The nearest approach to them, is to be found in our *Law Schools*, the benefits of which are just beginning to be appreciated. And could we keep the students as long in these schools, as they were kept in the English Inns, we might safely count upon making them accomplished lawyers by the time of graduation. But such are the opinions

entertained of the law as a profession, that not only is it everywhere and at all times crowded in point of numbers, but those who have chosen it are always impatient to be reaping its fruits.

§ 3 *Subdivisions of the Law.* The necessity for law grows out of man's social nature. It contemplates him, not as a single, solitary being, moving on alone to his final destination, but as making part of a vast multitude of similar beings, performing their earthly career in company, and therefore requiring numerous regulations to prevent confusion. These regulations constitute the science of law. If men were angels, no such regulations would be necessary. The eternal principles of right and wrong, emblazoned by a revelation from on high, and applied by a sleepless and unerring monitor within, would be all-sufficient for their government; and they might be safely left in that state of nature, where their Creator left them. But being men, and not angels, they require, in addition to the restraints of religion and morality, the positive regulations of municipal law. Society dares not leave the human will in the same absolute freedom, in which God has left it; but to the indirect sanctions of duty, has added the direct sanctions of law. And this consideration serves to designate the proper scope of the science of which I speak. It is not a part of religion or ethics, but is so much superadded to them both. They commit an egregious error, who consider jurisprudence as looking forward into eternity. It begins and ends with this world. It regards men only as members of civil society. It assists to conduct them from the cradle to the grave, as social beings; and there it leaves them to their final Judge. I would that this attribute of law were more generally appreciated. I say, then, that its proper scope would have been the same that it now is, had no voice from heaven, or from the depths of the human soul, proclaimed another world beyond the present. Religion and morality embrace both time and eternity in their mighty grasp; but human laws reach not beyond the boundaries of time. As immortal beings, they leave men to their conscience and their God. And though this consideration may seem, at first view, to detract from their dignity, I rejoice at it as a consequence of our absolute moral freedom. I rejoice, that in this country, at least, government dares not interfere between man and his Creator. I know no higher subject of congratulation, than the fact, that we have confined our legislators to their proper sphere; which is, to provide for our social welfare here on earth, and leave each to select his own pathway to immortality. But let me not be misunderstood. I do not say that human law has no concern with our moral condition; for it should do much to improve it. But why? Not because we are the subjects of future retribution; but because our social welfare, here on earth, is intimately connected with our moral condition. So far, then, as the dignity of the

law depends upon the relation in which it contemplates man, I claim for it no more, than it would have had, if death, instead of being the introduction to another life, had been an eternal sleep. Even then, human laws would aim to make this brief existence as happy as possible; and this is all they now aim to do. Doubtless they succeed infinitely better now, from having the all-powerful aid of religion, which would then be wanting; but still their proper function remains the same. Such, then, being the general aspect in which the law contemplates man, let us consider some of the subjects which it presents for our study.

First, beginning with the aggregate of human beings, spread over the whole surface of the earth, the law contemplates them as divided into distinct *nations*; each supreme within its own limits, and independent of every other, so long as there is ability to maintain this supremacy and independence. Yet these nations are not isolated and disconnected, like the inhabitants of different planets. They exist together on the same planet; and, therefore, like individuals, require established rules to regulate their intercourse. These rules constitute the *public law of nations*, which may be set down as the first and highest branch of jurisprudence. Passing over individuals, it deals only with sovereignties. It is, in fact, the gravitation of the social system, causing nations, like planets, to revolve in their proper orbits. What are the rights and duties of nations, in peace and in war, on the land and on the ocean?—These are the grave and solemn questions, which it is the province of the law of nations to answer. But it may be asked, what power there is to ordain laws for nations, which acknowledge no common government? There is no great international legislature; no general congress of nations. Whence, then, comes this branch of law? I answer, that nations, like individuals, are bound to observe the immutable principles of natural justice; and these, accordingly, profess to form the basis of the international code. But as nations might not, in all cases, concur in the deductions to be drawn from these abstract principles, recourse is had to past usage; and the doctrine is, that nations are bound by what custom has settled. The law of nations, then, is a collection of usages and precedents, dating back from the earliest historical traditions, and gradually accumulating with the progress of ages, until the aggregate has become a comprehensive code of established law; the study of which, is of the highest interest, as well with reference to the nature of its inquiries, as to the dignity of the parties concerned. The conquerors, and statesmen, and diplomatists, of all past time, come up in review before the student; and he scrutinizes their conduct amidst the lights which have been shed around it, first, by philosophical historians, and, afterwards, by the luminous minds of Grotius, Puffendorf, Vattel, Burlamaqui, Mackintosh, Wheaton, and other distinguished commentators on this

branch of jurisprudence. Moreover, there is high moral sublimity in the very idea of associated millions, constituting the highest supremacy this side of heaven, yet bound by laws, the observance of which is invited by the public opinion of the whole civilized world, and the violation of which is sure to be punished by the countless horrors of war; for such are the awful sanctions which secure obedience to the law of nations. The assembled world is the court in which this law is adjudicated; and destroying armies are commissioned to carry its sentence into execution. Who, then, will question the dignity of this branch of legal study? Next to religion, I know not that the human mind can employ itself in contemplations more interesting or sublime; and if the law of nations be not as practical as the branches which follow, it certainly makes up in grandeur, what it lacks in every day utility.

But there is another division of international law of the highest practical importance, which is denominated *private*, to distinguish it from the preceding. It grows out of the *conflict of laws* between different nations; a subject upon which our distinguished jurist, Judge Story, has recently given us a most learned commentary. No two nations have precisely the same internal laws. On the contrary, the diversity is so great, as almost to occasion a doubt whether there be any thing like immutable principles in jurisprudence. Now it results from the very nature of sovereignty, that each nation, without reference to extent, numbers, or situation, has unqualified supremacy within its own limits. Hence no law made in one nation, can have force in another, without the consent of that other. Yet, in the close and constant intercourse of nations, it must often happen, that in deciding in one nation, upon rights which originated under the law of another, complete justice cannot be done, without recognizing the law of that other. Here, then, is opened to the student a field of research, at once extensive and interesting. When the *lex loci* and *lex fori* come into conflict, in what cases shall the right of sovereignty yield to comity, and one nation recognize and enforce the law of another? If this be done in all cases, sovereignty is shorn of half its beams; if not done at all, the harmony of nations and the rights of individuals may be alike jeopardized. There must be, then, a system of general rules, to determine when the law of the place of adjudication shall prevail, and when not. Such rules there are; and they are to be found in the treatises on the conflict of laws. What was originally an open question, addressed to the comity or good feeling of nations, is now settled by precedent; and when the citizens of one nation remove to or travel in another, and make contracts, acquire property, marry, or die there, it is no longer a matter of doubt, by what law their rights will be determined. Thus the conflict of laws forms the second important and inter-

esting branch of legal study. The mind becomes elevated and expanded by the contemplation of great principles broadly applied. Human nature, too, presents itself under its most inviting aspect. The very idea that a branch of law has sprung up, from sacrificing the strict and imperative right of sovereignty to the accommodating principle of national comity, is in itself a subject of the most gratifying reflection. The ancient and barbarous notion that nations are natural enemies, and disposed, not merely to exact the last tittle of their rights, but also to do each other as much harm as possible, is shown to be a foul libel on the human race. The student finds, on the contrary, that the feelings of courtesy and benevolence are cherished with even greater constancy between neighboring nations, than between neighboring individuals; and he leaves the study with a higher opinion of his species, than he commenced with.

Secondly, having explored these two divisions of international law, the course of study brings the student home to his own institutions. For the rest, he is to investigate that internal or domestic law, by which his own rights and the rights of his fellow citizens are more particularly regulated. And here we begin with *constitutional law*, which, in this country, lies at the foundation of the social fabric. I say in this country, because it has been our glory to give the first example of a political organization based upon written constitutions. We hear much said, it is true, of the English constitution; but what is it? A mere collection of usages and precedents, gathered up in the progress of some twenty centuries, and subject to be modified or abrogated by the omnipotent will of Parliament. Not so with the American idea of a constitution. We understand it to be a solemn written declaration of the sovereign will of the people, in their original capacity, as the highest earthly power, prescribing the form and limiting the powers of the government, which they have thus voluntarily created. And this idea is as simple, as it is new and grand. A sufficient number of people to form a nation, enter into a compact for that purpose, and reduce the terms to writing. That instrument is their constitution; in conformity with which, as their organic and fundamental law, all other laws are to be made, and all delegated powers executed. But this primary idea of a constitution acquires some complexity from the peculiar organization of our political system. The people of the United States might have agreed to form themselves into one consolidated government; and, in that case, we should have had but a single constitution. But, for a variety of reasons, they preferred state governments, united under a federal government. This renders the department of constitutional law less simple, than it would otherwise have been. For, in the first place, we have the federal constitution, which speaks the sovereign voice of all the people of the United States, and is supreme over the subjects to which

it extends ; and next we have a constitution for each state, which is subordinate to the federal constitution, but supreme in all other respects. Notwithstanding, however, this double aspect of constitutional law, it is still very far from being a difficult study ; illustrated as it has been by the most able commentators. And as, to its dignity and importance, I presume there cannot be two opinions on the subject. Whatever may be said about subordinate branches, no American citizen can hesitate about this. He can but poorly appreciate the freedom he enjoys, who does not understand the great charter which secures it. I was about to go farther, and say, that he does not deserve to be free, who will not inform himself in what his freedom consists. But when I consider how many of our citizens have no opportunity of studying our constitutions, for want of suitable provision in our seminaries of learning, I forbear. In Rome, had Rome been blessed with a constitution, instead of the law of the twelve tables, every citizen would have been required to know it by heart. And shall the many here, whose high prerogative it is to rule the few, leave the study of the constitution only to the few ? Lawyers must study it, as the foundation of all other law ; and shall not others study it, as the foundation of their liberty ? I trust this disgrace is not always to attach to our system of education.

Thirdly, having mastered the principles of constitutional law, and thus laid firm and strong the foundations of the legal edifice, the student is prepared to commence the superstructure. He now understands the limits of delegated power. He has seen what laws may, and what laws may not be made ; and how the permitted laws are made and administered. It remains, then, to inquire, what the existing laws do in fact provide ? We may say, in general terms, that all the subjects of law resolve themselves into *rights* and *remedies*, connected with *persons* and *property* ; and this may sound like a very simple matter. But if, from this generalization, we descend into particulars, we shall find that there is scarcely an individual relation or interest, which is not the subject of legal provision, and therefore, of legal study. We take up then, in the next place, *the law of persons*, which comprehends all the various relations which the members of society can sustain towards each other. Here we have natural and artificial persons, including corporations ; public and private persons, including all who occupy official stations ; citizens, aliens, and Indians ; males and females, including the relation of husband and wife ; infants and adults, including the relations of parent and child, and of guardian and ward ; sane and insane persons ; masters and servants, including slaves, apprentices, and agents ; partners in business ; and lastly, executors and administrators. who come in to wind up affairs, when death has terminated all other relations.

Fourthly, we take up *the law of property* ; and here we have

things in possession, and things in expectation, including all the various kinds of contracts; and things real and things personal, including all the various distinctions between real and personal property. And when we have mastered these, we have yet to study their various modes of acquisition and transfer; by occupancy, marriage, descent, devise, and purchase, including the forms and properties of all the various instruments, by which ownership is evidenced or transferred, and the numerous liens which may attach in the course of these operations.

Fifthly, we take up *the law of crimes*; and here we shall be little aided by any American works. Even Kent's Commentaries omit this subject altogether; and we have comparatively few reported criminal cases. In some of the states, as in Ohio, this branch of law is made exceedingly simple, by substituting a criminal code in place of the common law; and even where this is not the case, the spirit of humanity has occasioned numerous modifications, all tending to make this division of legal study, equally simple and interesting.

Sixthly, the preceding subdivisions comprise what may be called the *theory* of the law; but the *practice* yet remains to be studied. It is one thing to learn what our legal rights are; but a very different thing to learn how remedies are administered, when these rights have been violated. *The law of procedure*, then, which is the only remaining division, is of great extent and intricacy. First, you have to acquaint yourself with *common law proceedings*, including whatever belongs to the conduct of a suit through the courts, from its commencement in the lowest court, to its final determination in the court of last resort. This would be no short task, if there were but a single form of action. But when you consider that there are as many as nine different actions, abounding in nice distinctions and cunning technicalities, you will realize that the labor must be multiplied as many fold. I know not that society bears, at present, one burthen so unnecessary, as the cumbrous system of common law proceedings. There would seem to be no more need of so many and such tedious forms of action, than there is of the exploded system of syllogistic reasoning. But this is not the place to enlarge upon such a topic. You turn then, in the next place, to *chancery proceedings*; and here you find much greater simplicity. There is but one general form for all cases; and this is so perfect, as an instrument of litigation, that it might just as well be adapted to remedies at law, as in equity. It is, however, so entirely different in every particular, that it must be made a distinct study. Lastly, you have to acquaint yourself with *criminal proceedings*, which differ essentially from both the others. But here, again, there is but a single form, and this is perhaps as simple as it could be made, consistently with precision. I should perhaps be safe in saying, that it requires four times as much labor to become familiar with civil proceedings

at common law, as with chancery and criminal proceedings both together.

§ 4. *Inducements to legal study.* My object thus far has been, to illustrate the nature of legal study, by hasty references to the sources of information, and to the subjects with which the law is conversant. If I have at all succeeded in this object, I have verified the declaration of Blackstone, "that the law employs in its theory the noblest faculties of the soul." He farther declares, "that it exerts in its practice the cardinal virtues of the heart;" and this is what I shall now endeavor to demonstrate. I do not intend to maintain that the legal profession is superior in respectability to all other professions; for I do not so believe. On the contrary, I consider all honest occupations as, in the abstract, equally respectable; because they are all equally necessary. If there be any difference, in this respect, it consists not so much in the profession itself, as in the manner in which its duties are discharged—"Act well your part: there all the honor lies." In this view, the world may be compared to a vast workshop, in which all varieties of business must be going on simultaneously, because the countless wants of mankind cannot be otherwise supplied; and in order that each kind of work may be performed well, this mass of labor is divided into an almost infinite number of branches, each workman attending exclusively to his own particular branch. If then all the laborers work equally well, they deserve to be accounted equally respectable. And yet between the employment of making heads for pins, and that of administering laws for a nation, there is certainly vast room for preference. Both are necessary, and both respectable; and yet every one feels that they differ immeasurably in point of dignity.

I begin then with the remark, that the employment of the lawyer is pre-eminently one of trust and confidence. The law itself so regards it; for it excuses the lawyer from revealing what his client has confided to him, while it compels a disclosure even from a religious confessor. But what is still more to the purpose, men so regard it. The province of a lawyer is to vindicate rights and redress wrongs; and it is a high and holy function. Men come to him in their hours of trouble; not such trouble as religion can solace, or medicine cure; but the trouble arising from innocence accused, confidence betrayed, reputation slandered, liberty assailed, property invaded, promises broken, the domestic relations violated, or life endangered. The guilty and the innocent, the upright and the dishonest, the wronging and the wronged, the knave and the dupe, alike consult him, and with the same unreserved confidence. It is not given to man to see the human heart completely unveiled before him. But the lawyer perhaps comes more nearly to this, than any other; for there is no aspect in which the character does not present itself, in his secret consultations. All the passions, all the vices, and all the

virtues, are by turns subjected to his scrutiny. He has thus studied human nature in its least disguised appearances. He has watched it under all trials; in the light and in the shade, in ecstasy and in despair, in glory and in shame.

But let us leave his office, and pursue him to the forum. Here is his field of triumph and renown, or of defeat and shame. Here he meets his antagonist, in the sharp encounter of wit, reasoning, and persuasion. He has pledged his best exertions to his client; he has a liberal compensation in prospect or possession; and his reputation is at stake in the result of the cause. Here then is every incentive to eloquence, and every opportunity to display it. He is in the field where the great advocates who have gone before him, have won their laurels. He speaks indeed to convince the court, and persuade the jury. But a listening crowd are hanging upon his accents, and making up a verdict for or against himself. And above all, his client is there, intently watching every word and motion, because on them are suspended all he holds dear.

At length we follow the successful lawyer, from the bar, to the bench. The counsellor has at last become the judge. The topmost round of the ladder is now reached. And here all the high qualities of his nature are called into exercise. The sagacity which cannot be misled by sophistry; the integrity which nothing can shake or bribe; the stern impartiality, which forgets the parties and looks only at the cause; the dignified courtesy, which rebukes levity, while it wins respect: these are the qualities, without which all the learning of a Coke would not make a worthy judge; and which no where shine so conspicuously as from the bench. Of the power which belongs to the judicial office, of the all-pervading influence exerted by a Mansfield or a Marshall, for example, I need not here speak. Such men live in their decisions, through all coming time; for these decisions go to swell the great aggregate of common law, and thus determine the rights of generations yet unborn.

Nor is it to the judicial office alone that the lawyer may aspire. His studies pre-eminently fit him for every civil office. In the halls of legislation, he must ever occupy a conspicuous place, because no man is so well prepared to suggest and frame new laws, as he who knows what the existing laws contain. It is a well known fact, that from the days of the Revolution down to the present time, no single class of the community has performed so much of the public service of the country, as the members of this profession. I do not mention this as a motive to study law, but as a proof of the estimation in which the profession has been held. As a motive I should rather hold it in contempt. I know not a greater vice of the times, than the all-prevalent hankering after office. It is degrading alike to electors and elected. The old idea was, that office should seek the man; now the man

seeks the office ; and he descends to the most humiliating compliances in order to obtain it. Men seem to forget their self-respect, when they seek honor from office ; as if that which is factitious, could alter that which is inherent in the man. But this is a digression. I would hold up the legal profession, as an end in itself, not as a stepping-stone to something higher. In fact there is nothing higher. He who stands at the head of this profession, is on a level with the most elevated in the land ; and instead of owing his eminence to the solicited suffrages of others, he has the proud satisfaction of having achieved it for himself. Nor is this all. If such be the influence of the profession, in calm and peaceful times, what must it not be, when the elements of society are thrown into unwonted commotion ? Hitherto, indeed, since the formation of our government, the political horizon has been comparatively calm. There have been some threatening clouds now and then, but no destroying tempests. In the main, the fundamental rights of men have been scrupulously respected, and the laws duly observed and administered. A learned bench, and an upright bar, have quietly preserved the order of the system, while the busy and protected public have hardly felt their influence. But imagine a reverse ; for it is at least possible, and the enemies of free government are loudly predicting it. We are trying the greatest political experiment the world ever witnessed ; and the experience of all history warns us not to feel too secure. A voice from the tombs of all the departed republics, tells us that if our liberty is to be ultimately preserved, it is at the price of sleepless vigilance. I refer not to foreign aggression, for of this we have nothing to fear ; our only foes are those of our own household. Domestic aggression may come from two quarters ; from those who govern, or from those who are governed. On the one hand, power is always tending to augmentation. Those who have some, employ it to gain more ; and if not seasonably withstood, become too strong to be resisted. And on the other hand, liberty is always tending towards licentiousness. The more men have, the more they are likely to want. Being free from many restraints, they would do away with all. Now when dangers threaten, from either of these quarters ; when rulers would trample the law under their feet, or mobs would rise to overthrow it ; who are the sentinels to give the alarm ? Do I assume too much, in saying, society looks with confidence to that class of men, whose profession it is to watch over the law ?

We have now followed the lawyer through his whole career of study, practice, and distinction. Rising with the dawn, and trimming assiduously the midnight lamp, we have seen him exploring the law of nations, constitutional law, the law of persons, the law of property, the law of crimes, and the law of procedure ; and for this purpose, ransacking the precedents

of all ages, to supply the immense chasms in actual legislation. Having thus stored his mind with the vast and various lore of jurisprudence, we have seen him in secret consultation with his clients, contending at the bar, deciding from the bench, and filling the high places in his country's service. But perhaps it may be said, that one side only has been exhibited. I am well aware that there are prejudices against the profession. It is said to abound with pettifoggers, who pervert the law to the purposes of knavery; with quacks, who sacrifice their clients through their ignorance; and with needy hangers-on, who will foment lawsuits, rather than not have them. Lawyers are said to delight in tricks, stratagems, and chicanery; to argue as strenuously for the wrong as for the right, for the guilty as for the innocent; and to hire out their conscience, as well as their skill, to any client who will pay the fee. What shall be said to these charges? I, for one, am willing to admit their truth, to some extent. Our profession abounds with opportunities and temptations to abuse its high functions; and it would be strange indeed, if it had not some unworthy members. We lay no claim to superhuman virtue. We see unworthy members in every other profession, and therefore take no shame to ourselves that they are sometimes to be found in ours. We also take refuge behind the maxim, that supply corresponds to demand. If there were no dishonest or knavish clients, there would be no dishonest or knavish lawyers. Our profession, therefore, does but adapt itself to the community in which it is exercised. From all these views, however, the leading impression which I desire to leave upon your minds is, that lawyers must dearly earn all they obtain, whether of honor or emolument. Let no man enter the profession as a sinecure. Genius, without toil, may, to some extent, distinguish a man elsewhere; but here he must labor, or he cannot succeed. No quickness of invention can supply the place of patient investigation. A clear mind might determine at once what the law ought to be, but actual inspection alone can determine what the law is. Let those, therefore, who would prepare themselves "for untying the knots and solving the enigmas of jurisprudence," first of all make up their minds to hard work. Let them weigh well the fact, that, "to scorn delights and live laborious days," is the indispensable condition of professional eminence. On somewhat easier terms they may prepare themselves "to prowl in courts of law for human prey;" but nothing short of resolute, emulous, persevering study, can raise them to that height, which alone should satisfy a generous ambition.

It only remains that I announce the general plan of these lectures.—As I am to treat only of the elements or first principles of law, I shall be very sparing in the citation of authorities. Particular references to volume and page, for each proposition I may advance, would consume much time and space to very little pur-

pose. Unless, therefore, there be some special reason to the contrary, I shall merely name the authors who may be consulted on each subject; and request you to take my word for the truth of what I may advance. Moreover, while I shall endeavor to state correctly what the law is, I shall also take occasion sometimes to suggest how it may be improved. For highly as I estimate the dignity of the profession, I am not so much enamored of the law itself, as not to perceive that it has many imperfections. It is true that the common law comes to us with letters of commendation from a comparatively remote antiquity. Sage after sage, through a long lapse of time, has paid it the tribute of lofty panegyric. It has not only been said to embody "the gathered wisdom of a thousand years;" but also to be in sober truth, "the perfection of reason." Americans are called upon especially to revere it, as the parent of modern liberty. Because it withstood, with genuine Saxon obstinacy, the early encroachments of Norman usurpation, we are expected to believe that it breathes throughout the very soul of indomitable freedom; and that, for this reason, our ancestors brought it over to this country, on their first immigration, and cherished it as their most precious heritage. But to all such suggestions, it is sufficient here to reply, that if hoary antiquity, and unbounded encomium had been permitted to preclude scrutiny, the philosophy of Aristotle, would still enslave the human mind. The true ground to be assumed is, that neither the antiquity of our law, nor its present wide supremacy, proves any thing, one way or the other, as to its intrinsic excellence. Our ancestors adopted it from necessity, because they had no other, and we have been slowly modifying it to suit our condition. But numerous changes are yet required, before the system can be pronounced as perfect as it admits of being made. How, indeed, can it be otherwise? Admitting that mankind are improving, from generation to generation, how is it possible, that rules, and maxims, and usages, which grew out of, and were adapted to the condition of ages comparatively dark and barbarous, should be adapted to our present condition? Will not a total change in the opinions, habits, manners, and political institutions of a people, make a corresponding change necessary in their municipal regulations? These questions will admit of but one answer; and therefore I regard the subject of *legal reform*, as one of momentous importance. The laws by which we are governed, affect so intimately all our relations and interests, that a single defect, from the universality of its operation, swells into a vast evil; for its effect in a single instance, is to be multiplied by the crowding millions of our population, in order to estimate it rightly. If, then, there be defects in our system, let them be fearlessly exposed. He is no enlightened friend, but a blind bigot to the law, who will see no imperfections himself; or, seeing them, will endeavor to conceal them from others. I am not,

however, a lover of innovation for its own sake. I know that the mere fact of novelty, is no recommendation of itself; and that great respect is always due to the experience of past ages. I will also grant, that in the unparalleled mental activity of the present age, the tendency is to think too little, rather than too much, of present institutions. And when about to propose any radical reform, this fact should always be borne in mind; otherwise we may unintentionally give the wheel of reformation such an impetus that it will revolve too far. But on the other hand, there may be such a thing as too much contentment with things as they are. That sluggish disposition of mind, which desires no change, is as much to be deprecated, as its opposite. Let it become universal, and the progress of human improvement would cease; the world would come to a final pause; and a deep and hopeless lethargy would settle down upon the race of man. There is, however, a golden medium between these two extremes. It is that disposition of mind, which neither reveres what is old, nor admires what is new, merely on account of its being old or new; but submits every question to the test of strict examination upon its intrinsic merits. And this is the disposition with which I hope to comment upon the various topics hereafter to be presented.

LECTURE II.

PRINCIPLES OF POLITICAL ORGANIZATION.

§ 5. *Origin of government.* In the preceding lecture, I stated that municipal law comprehends the established regulations of political society: hence the propriety of a preliminary inquiry into the fundamental principles of *political organization*. To this end, let us begin with man in that condition which is usually denominated *a state of nature*. In point of fact, this condition may not now exist; but it can be understood by imagining a sufficient number of persons to have been casually thrown together in a wilderness, beyond the control of any human government; and that we may not be embarrassed with tracing their slow progress from ignorance to intelligence, let them be supposed to have already attained to this condition. It is obvious, that upon first meeting, these persons would be subject to no other *laws*, than those which belong originally and inseparably to their constitution, as *intellectual*, *moral*, and *physical* beings; and which are denominated the *laws of nature*. We need not now inquire how these laws are made and ascertained; it being sufficient for our purpose, that

their universal existence and supremacy are admitted. By them, therefore, the *rights of nature*, or *natural rights*, are to be determined and regulated. The term *right*, has many meanings, which need not here be discussed. As a quality of actions, it means *consistent with law*; and therefore the rights of nature depend upon the laws of nature. *Wrong* as a quality of actions, is the opposite of right, and means *inconsistent with law*. Both right and wrong, therefore, in a state of nature, are determined by the laws of nature; and *obligation or duty*, is determined in the same way, for it corresponds to right. When we are subjected to any law, we are said to be under obligation to conform to it. This is implied in the very nature of law. The kind of obligation depends upon the nature of the law. If it be a physical law, the obligation is a matter of physical necessity; we cannot help obeying it. If not, the obligation is a matter of choice, and is determined by motives; and herein consists *natural liberty*, or the freedom of a state of nature. Individuals, in this condition, are under no other restraint, than that which results from an apprehension of the consequences which follow from conformity or non-conformity to the laws of nature; in other words, their conduct is regulated by a sense of *moral obligation* alone. Having as yet, contracted no engagements with one another, each individual is in a state of complete *personal independence*; and since no one can as yet have acquired any rights, which nature does not vouchsafe equally to all, it follows that in a state of nature, there is a perfect *equality of rights and obligations*. And this is the only equality that would exist; for we cannot suppose that any two individuals would be absolutely equal in point of fact, either physically or intellectually. The only equality that can exist among men is a *moral equality*, or an *equality of rights and obligations*; and this is a fundamental condition of the state of nature.

Such being the relations of men in a state of nature, we may safely conclude that they could not long continue in this primeval condition. A community of angels might need no other restraint upon their actions; but constituted as men are, the moral obligations of a state of nature would not be sufficient to maintain harmony and order. To hinder the strong from oppressing the weak, and prevent might from trampling upon right; in a word, to avoid the nameless evils of *anarchy*, something more than a *moral government* would be found indispensable. But a *civil government* could only be established in one of two ways; by *coercion or consent*. A government founded on coercion, is called *despotism*; and exists whenever one or more individuals make their *will* the law for the rest of the community, and *compel* them to submit. Perhaps in the case supposed, some such attempt would be first made. But there being no moral obligation to submit to such usurped dominion, and a strong natural impulse

in every bosom to resist it, a despotic government could have no hope of permanency. The first opportunity would be seized to throw it off. This could only be done by concert and co-operation among the disaffected and oppressed. Sooner or later, this crisis must arrive; and then, if not at first, there would be a voluntary association, for the purpose of establishing a government by consent. This is what we understand by entering into the *social compact*; the result of which would be to exchange *natural for civil liberty*. Each member of the new community would relinquish some portion of his natural rights, to obtain better security for those reserved, which would now be called *civil rights*. For the reasons before given, the concessions made by each ought to be the same; and the aggregate of these individual concessions would measure and constitute *the powers* of the new government. As no unnecessary restraint would be voluntarily submitted to by rational men, the problem to be solved, in framing the terms of the compact, would be, to construct such a system of government as would effectually secure the general welfare of the whole, at the least possible sacrifice of individual freedom. A government so constructed, would be emphatically a *free government*, since it would derive all its powers from the consent of the governed. The nature and limits of these powers need not here be discussed in detail. It may be well, however, to glance at some of the more general principles by which they would be determined.

It is not improbable, that the supposed community would set out with the experiment of holding all things in common, recognizing no separate individual property. If so, the powers of government would extend only to the regulation of the *personal rights* of the members. But this state of things would not long continue. Experience would soon demonstrate, that the only efficient incentive to activity, is the hope of profit and accumulation, which results from the appropriation, to each individual, of the avails of his own labor. The *exclusive ownership of property* by individuals, therefore, would ultimately, if not at first, become the subject of regulation: and then the powers of government would extend to the regulation of the *proprietary* as well as *personal* rights of the members. And we may say, in general terms, that the regulation of these rights would be the whole aim and purpose of the compact creating the government. Such, then, being the *objects* to which the powers of government would extend, the following general rules ought to regulate their exercise.

1. The powers of government should operate upon *conduct* only, and not upon *opinions*. And the reason is, that mere opinions, not carried into action, can affect neither the *persons* nor *property* of others. Besides, the very attempt to regulate opinions would be preposterous; for though government may

enforce outward conformity, it cannot, in the nature of things, reach the inward thoughts. Men could not renounce the freedom of opinion if they would; and they would not, if they could.

2. They should operate upon *civil conduct* only, and not upon *moral conduct* apart from civil. I have touched upon this topic before. The reason is, that government has no concern with men except in the capacity of *citizens*, or members of civil society. As *moral agents*, we are accountable to another and higher power. Human government cannot fix the standard of moral right and wrong; and it should not even attempt to enforce conformity to the standard established by the Creator, any further than the temporal welfare of society requires. Its province does not reach into eternity, but ends with time. This attribute of human power, which may be called its *worldliness*, depends upon the obvious consideration, that there can be no such thing as *merit* or *demerit*, without the liberty of choice. We cannot be good or bad upon compulsion. It is only as *free agents* that we can deserve praise or blame. Hence we must be careful to distinguish between *moral right and wrong* and *legal right and wrong*. Human power may determine the latter; but the former depend upon a superhuman power.

3. They should be revocable at pleasure, by the people who granted them. The reason is, that if one generation could bind its successors for any definite period, it might, on the same principle, bind them for ever; and thus make slaves of all posterity. Perpetual powers would be clearly incompatible with liberty. Each generation must have the option of dissenting from powers previously conferred; and then, from its omission to dissent, its continued assent may be presumed. How far this general principle has been departed from, in the case of *charters*, will be considered hereafter.

4. The system must be founded on a *perfect equality of rights*. The reason is, that an intelligent people would consent to no other arrangement. Enjoying this equality in the state of nature, we cannot doubt that they would insist upon retaining it under the compact. Sooner than voluntarily disfranchise themselves, by yielding up rights to be enjoyed by others, having no better claim than themselves, they would undoubtedly refuse to join in the compact.

5. It must be agreed that in all points of difference, *the majority shall prevail*. This would be a matter of necessity. Absolute unanimity on all subjects is out of the question. Concession therefore must come from some quarter, or compulsion would follow. If resort be had to physical force, the majority must of course prevail; and the only way to avoid this resort, would be for the minority to submit without it. This would be the more readily agreed to, however, for another reason. There is always a fair presumption, that of two sides of a question, that side on

which the greatest number of free minds concur, is the right side. This indeed may not always be true, and therefore it might be expedient to provide, that certain very important measures should require the concurrence of something more than a bare majority. But still it must obviously be a preliminary condition to the first movement, that the majority shall prevail.

§ 6. *Idea of a Constitution.* Setting out then with the position that while all are to have equal rights, yet, in cases of difference of opinion, the majority are to prevail; the question would now be, who shall exercise the functions of government? Or, in other words, where shall the supreme power or *sovereignty* of the community be lodged? Since all power belongs originally *to the people in mass*, it is probable that, in the first instance, arrangements would be made for exercising it personally; each member participating equally in all public affairs. This would constitute a *simple democracy*. But it would obviously be adapted only to a small and compact population. When the people should become numerous and widely diffused, they would find it inconvenient, if not impracticable, to assemble for public business, as often as occasion would require; and when assembled, there would be too many voices to act with energy and despatch. These considerations would suggest the adoption of some other scheme. And since we cannot suppose that a wise people would consent to give up the fundamental doctrine, that all power belongs of right to them, the problem would be to substitute some form of government, which would retain this great democratic principle, and at the same time obviate the necessity of a direct participation by each individual in all public affairs. This could only be done by adopting the principle of *representation*, whereby one person would be authorised to represent or act for any given number. In this way, the system might be adapted to any amount of population or extent of territory; while, at the same time, the great body of the people could attend, with little interruption, to their private affairs. The *representatives*, to whom authority would thus be *delegated*, would be the *servants* and not the *masters* of their *constituents*, whose will it would be their office to execute; and the government would now be changed from a *simple*, to a *representative democracy*. But since representatives ought not to be trusted with *unlimited discretion*, some method must be devised for defining their powers. And as it would be difficult, if not impossible, to give them *special instructions* for each particular occasion, a set of *general and permanent instructions* would be provided, to serve for all occasions. And this is what we understand by a *constitution*. In other words, a constitution is a written expression of the sovereign will of the people, in relation to the form and powers of government. Proceeding from the people in their supreme capacity, as the highest earthly power, it could be transcended or

abrogated by them only; while to their representatives, it would be a supreme and inviolable law. In framing this constitution, one of the leading objects would manifestly be, to define with all possible accuracy the powers delegated to government. This might be done by *enumeration*, or by *prohibition*, or by a combination of both. First, all the powers to be exercised might be specifically enumerated; and thus all powers not specified, would, for that reason, be prohibited; because the grant would be special, and the prohibition general. But the difficulty of this method would be to make an enumeration so full and complete as to reach all the details of municipal regulation. Again, all powers not to be exercised, might be specifically prohibited; and thus all powers not thus prohibited, would, for that reason, be conferred; because here the prohibition would be special, and the grant general. This method would be less difficult than the other, because there are fewer things to be prohibited, than to be authorised. And the manner of prohibition might be twofold. Some things might be *directly* prohibited, by declaring, in so many words, that they shall not be done; while other things might be *indirectly* prohibited, by a declaration of certain fundamental rights of the people, which should never be infringed. But after all, absolute certainty could scarcely be attained in either way. And even when both should be combined, much, probably, would still remain to be deduced from the fundamental doctrines of the social compact.

§ 7. *Checks and balances.* The definition of delegated powers by a written constitution, would thus be the first grand movement towards free government. But as yet, there would only be a government on parchment. To give directions is one thing; to insure obedience is a very different thing. These powers are to be exercised by men over men; and it would be necessary to take all possible precautions to secure their proper administration. The two principal qualities required in the officers of government, in order to insure a good administration, are *ability* and *fidelity*. Accordingly in constructing the machinery of the constitution, all efforts would be directed to these two points; and the results would constitute what are denominated the *checks and balances* of the government. On the nice adjustment of these, the experiment would mainly depend. For unless delegates can be prevented from abusing the trust committed to them, a representative government would be little better than a despotism. What then are the safeguards of delegated power? Some of the more important I will briefly describe.

1. *Mode of designating officers.* Much would depend upon the mode of designating the public functionaries. They should not be designated *by lot*, because this would render their fitness a mere matter of chance; and the only other method which suggests itself, is *by suffrage*. As the right of suffrage would,

on the principle of equality before mentioned, be *universal*, every individual would thus be enabled to exercise his *judgment* as to the qualifications of the candidates; and we may reasonably presume that the best men would thus be elected. If not, it would be the fault of the voters and not of the system. Whether the voting should be done openly, by oral declaration, or secretly, by written ballot, would be a subordinate question, upon which fair minds might reasonably differ, and which I shall not stop to discuss.

2. *Tenure of office.* This would be the next important point. Office should not be made *hereditary*, for the same reason that the first incumbents should not be designated by lot; namely, because this would render fitness a mere matter of chance; and also because the creation of a *privileged order* or *aristocracy*, born to rights not enjoyed by others, would conflict with the principle of equality. Should it then be for life, or for some shorter period? This question must be decided upon a comparison of advantages. On the one hand, a long term of service would furnish to the incumbent the strongest motive to qualify himself well, because he would hold the office long; it would afford opportunity for so doing, because in all things practice makes perfect; and it would give uniformity and stability to the administration of government, because the same men would be likely to continue the same policy. But on the other hand, a short term would afford the best of all securities for fidelity, because it would allow no opportunity for any systematic plan of encroachment; and more especially, because it would render the responsibility of the incumbent to his constituents, more immediate and certain. And therefore, since the want of fidelity would be more to be dreaded, than the want of ability, because the consequences would be more pernicious, a comparatively short term of service, would on the whole, be preferred, as a general rule; subject, however, to exceptions, depending upon the nature of the service.

3. *Number of officers.* This would be another important matter. If all power should be delegated to a single person, which would constitute a *simple monarchy*, to say nothing of the impossibility that one man could personally manage all public affairs, the liability to abuse would manifestly be greater, than where several minds were required to concur. And on the other hand, if the number should be very large, their movements would be unwieldy, and the government expensive. A medium between these extremes would therefore be preferred; and the public functionaries would be sufficiently numerous to perform the public service well and no more.

4. *Division of powers.* This would be the next point of discussion. Should all delegated power be concentrated in a single body of men, thus constituting a *simple oligarchy*; or should it

be distributed among different bodies, thus constituting a *mixed government*? There would be two reasons in favor of distribution. *First*, the liability to abuse would be less, because the different departments could not so readily cabal together; and *secondly*, the distribution would secure that increased ability, which, in all human affairs, results from a division of labor. These reasons would preponderate over the argument derived from the simplicity of a single body; and the powers of government would be distributed among distinct departments. But what should be the number of departments? This would be determined by an analysis of the powers to be distributed. Since no wise people would voluntarily subject themselves to the *transient commands* of any set of men, however instructed and controlled by a constitution, the public functionaries would be required *to govern by fixed laws*; and it follows, that the aggregate of power to be delegated, would be that which is necessary for making and administering a system of laws, founded on the constitution, as the paramount law. This admits of a threefold division, according to the functions naturally called into exercise. *First*, the laws must be made and promulgated; and the persons designated for this function, would constitute the *legislative department*. *Secondly*, the laws thus made must be expounded and applied to cases as they should arise; and the persons designated for this function, would constitute the *judicial department*. *Thirdly*, the laws thus made and adjudicated upon, must be carried into execution; and the persons designated for this function, would constitute the *executive department*. Accordingly, there would be a primary distribution of all delegated powers among three distinct departments, the legislative, judicial, and executive.

5. *Subdivision of powers.* After this primary division of powers, a further *subdivision* might advantageously be made. The first desideratum would be a system of laws *good in themselves*, independently of their administration. This would depend upon the organization of the legislative department; and here the object would be, to insure a thorough knowledge of the wants of the community, and the most mature deliberation upon the measures proposed for supplying those wants. Now, all other things being equal, it requires no argument to show that a subdivision of the legislative department into *two distinct branches*, whose independent concurrence should be necessary to the enactment of every law, would furnish greater assurance of salutary legislation, than if the legislative power were all concentrated in one body. Again, the judicial power would, in like manner, admit of a beneficial subdivision. It is obvious, that in every case of an alleged violation of law, two questions are submitted to judicial cognizance. *First*, what are the *facts* of the case? *Secondly*, the facts being ascertained, what is the *law*

applying to them? These questions being entirely distinct, and security against abuse of power being more important than simplicity of organization, the power of deciding these two questions, instead of being committed to the same persons, might be advantageously divided between two distinct sets of persons. Thus there would be *jurors* to pronounce upon the facts, and *judges* to decide upon the law. Lastly, in regard to the executive department, although it must comprehend many individuals, yet as the nature of its functions requires energy and despatch, to which unity is essential, this would be a sufficient reason for departing from the principle of division, and vesting the whole executive power primarily in a single person. He must, however, employ many subordinate agents; and to guard this power of appointment from being abused, his nominations might be made to require the confirmation of an independent body of men, before taking effect.

6. *Constitutionality of laws.* In addition to the security thus provided that the laws would be well made and administered, a further safeguard would be found in the doctrine, that no law would be valid, unless *conformable to the constitution*. Although the constitution could not specify in detail what laws should, and what laws should not be enacted, yet it might and should specify certain fundamental properties, without which no law should be valid, and these should serve as landmarks in legislation. But here the question would arise, who is to decide upon the *constitutionality* of laws? In the first instance, the *legislature* would express its opinion by enacting the law in question; hence it must of course suppose itself not to have transcended its powers. In the next place, it might be found expedient for this and other purposes, to require the assent of the *executive* to the consummation of the law; and since an *absolute veto* might be dangerous, the executive discretion could be restricted to referring an objectionable law back to the legislature for *re-consideration*. But still there would be wanted some tribunal to settle the question of constitutionality in the last resort, whose decision should be final and conclusive; and this tribunal would of course be the *judiciary*. For when a law should come before this department for adjudication, its constitutionality would be the first question to be decided; since, if it were unconstitutional it would not be a law, though it had the form; and it would accordingly be declared invalid.

7. *Other safeguards.* The safeguards now enumerated, being provided for in the constitution, would form the principal securities for good government. Some minor precautions might indeed be taken, by so regulating the *compensation* of officers, as to remove all temptation to venality; by so securing the *freedom of speech and of the press*, that their conduct should be constantly open to public scrutiny and animadversion; and by providing such means of *removal from office* by impeachment or other-

wise, for official misbehavior, as would enable an unworthy incumbent to be displaced, even before his term of service expired. But without pursuing this course of inquiry into further details, suffice it to say, that when all this complicated machinery should be put into complete operation, the community thus organized would constitute one of those distinct political societies, which we denominate a *state* or *nation*.

§ 8. *Idea of a Federal Government.* And now for the purpose of further illustration, let us suppose *several states or nations*, organized in a similar manner. It is obvious that these nations, however unequal in numbers or resources, would be entirely equal in their political rights. Having as yet contracted no mutual engagements of any kind, each would be in itself completely sovereign and independent. Their relative situation as nations, would be in all respects analogous to that of individuals, prior to entering into the social compact. There being no common power to legislate for them, their reciprocal rights and obligations must at first be deduced solely from the laws of nature, applied to them as moral beings. In process of time, however, the principles of natural law, deduced from reason and revelation, and applied to cases as they should arise, would acquire the additional force of custom and usage; and in this way, a system of rules for the government of national intercourse, would be gradually formed, and would constitute their *jus gentium* or *law of nations*. In addition to which, they might also enter into mutual engagements, under the name of *compacts or treaties*, and thus superadd their own positive stipulations to the moral and conventional code before mentioned. But howsoever complete might be the code of international law thus slowly matured, there would be no common judicial or executive power; and consequently the due observance of the laws thus acknowledged, must depend solely upon good faith. Each nation would still remain the exclusive judge of its own rights and duties; and in case of controversy, there being no common interpreter or umpire, with power to enforce his decisions, the only alternative would be war or submission. The weaker nation would thus lie at the mercy of the stronger, and right would be compelled to surrender to might. This state of things must continue so long as these nations should remain entirely distinct. Peace would thus be burthened with preparations for war, and war would bring on a train of evils which no words can adequately describe. These contiguous nations, therefore, would have almost the same motives for forming a common government, as individuals have for entering into the social compact. And now the problem would be, to construct a government adapted to the end proposed. On the one hand, a mere *league* or *alliance*, binding the several states only in their collective capacities, and not operating upon individuals, would hardly deserve the name of a government, since it would

want the requisite strength and efficiency. Reliance must still be had upon the good faith of the members; since, if they should refuse to comply with the terms of the league, there would be no means of compulsion. Such a feeble union, therefore, would soon be dismembered. And on the other hand, an absolute *consolidation* of all the states into one, by completely annihilating their separate governments, and extending one universal government over the whole, would not be agreed to, because the people of the several states would naturally cling with fondness to their own particular governments; and also because such an arrangement, even if assented to, would be scarcely practicable, on account of the vast extent to which it would thus be necessary to carry the details of municipal regulation. For these reasons, a medium between a league and a consolidated government would probably be preferred; and this would be a *federal government*, in the strict sense of these words. The grand design of this government would be to unite the people of the *several states* into one nation for *national purposes* only; and accordingly for all *municipal purposes*, each state would still retain its former government, divested, however, of the attributes of complete national sovereignty. The powers conferred upon the federal government would extend to no other objects than those of the most public and general concern to all the members of the confederacy; and these powers would be carefully defined by a *federal constitution*; while all other powers would of course be reserved to the state governments, or to the people. With these qualifications, the structure of the federal government, in all its departments, would resemble that of the state government already described; and consequently the particulars need not now be repeated. Suffice it to say, that each citizen would now owe obedience to two distinct governments, one *national* and the other *municipal*; and political organization would thus have reached the farthest limits to which it has yet been carried.

§ 9. *Legal sanctions.* (a) This outline, however, would be incomplete, if I should dismiss it without adverting, for a moment, to the *sanctions* of law. By sanction is here meant the inducement or motive to obedience. *Legal sanctions* consist in the prospective pains or pleasures consequent upon violating or conforming to the laws. No doubt that the citizens of a free government are under a *moral obligation* to obey the laws, on the principle of consent; but it is unnecessary to discuss this question, because obedience is not left to a sense of duty. If laws were merely *recommended* to the observance of the citizens, as a system of salutary rules, and then left to invite obedience or not, according as their intrinsic importance should be felt, they would be in a great measure nugatory. The social compact would add

(a) See 1 Hoffman's Legal Outlines, 279.

little or nothing to the restraints of a state of nature. In order then to give the laws a requisite efficiency, there must be something more than a moral sanction; and accordingly there is annexed to every law a direct sanction, which consists in this, that when a violation is judicially ascertained, the legal consequences will be enforced by the whole power of the community. Legal sanctions, however, are of two kinds, *civil* and *penal*. When the injury which would result from the violation of a law, is such that it can be redressed by a mere *compensation* or *restitution* to the party injured, it is deemed sufficient to compel the aggressor to render this kind of satisfaction. And this is the case with respect to a large proportion of all the injuries, whether to the *person* or to *property*, which take place in society. Such injuries are denominated *civil*; and the sanction of the laws made to prevent or redress them, consists in the pledge of the public faith, that if the injured party take the proper steps to obtain redress, it will be enforced by the public arm. But there are other injuries both to the *person* and to *property*, of so atrocious a character, that either they do not admit of any thing like compensation, or, for other reasons, the welfare of society requires a more efficient sanction, in order to prevent them. Such injuries are denominated *crimes*, *offences*, or *misdemeanors*. And to guard against them, in addition to the enforcement of restitution, where the case admits of it, the laws provide a *penalty* or *punishment*, in case of transgression; which penalty or punishment is proportioned, not so much to the actual injury sustained in each particular case, as to the necessity of preventing a repetition of the act. Such, then, are the civil and penal sanctions which give efficacy to municipal laws. By entering into the social compact, the citizen has renounced the right of taking redress for injuries into his own hands; and in return for this, society has given him its pledge to redress them for him. Instead therefore, of relying upon his own individual strength, as in a state of nature, every member of society may command, if necessary, the whole strength of that society to prevent or redress his wrongs.

For the sake of simplicity, I have presented this outline of political organization *hypothetically*; but I have, in fact, described the precise system under which it is our happiness to live; and I trust that this method of exhibiting it, while it traces government in general up to its elementary principles, will at the same time, have the effect of demonstrating the entire conformity of our government to the principles of enlightened reason, as applied to the free nature of man. We did not indeed pass through the exact gradations I have supposed; and probably no nation has. But the consummation of our system is precisely such as I have endeavored to sketch; this will be abundantly proved in the sequel. In the mean time, it is sufficient to say, that when the British colonies in America declared their independence, they

may be considered as returning for a moment to that state of nature, to which I have referred. The people of each colony then established by general consent, an independent state government; and afterwards, the people of all the states became united, by like consent, under one federal government: so that, at this moment, the United States exhibit a complete picture of that political organization, of which I have only traced a very general and imperfect outline.

LECTURE III.

HISTORICAL SUMMARY.

§ 10. *Title of Great Britain.* (a) In the preceding lecture, I presented a *hypothetical* outline of the organization of civil society. I shall now offer a brief *historical* outline of the actual organization of our American society. Prior to the year 1492, this entire continent was in the exclusive possession of an uncivilized race of men, called *Indians* or *Aborigines*, who had *occupied* it from time immemorial. Had the character of their occupancy been the same as that of civilized men, it is obvious that the Europeans could only have obtained their title by *purchase* or *conquest*; since the right of *discovery* can manifestly attach only to unoccupied territory. But the occupancy of the Indians, who subsisted chiefly by hunting, was considered, by the various discovering nations, to be of too vague and undefined a character, to confer an exclusive right to the vast regions over which they habitually roamed. The civilians of that day, maintained the doctrine—whether correctly or not, I shall not stop to inquire—that it never could have been the design of the Creator, that a few thousand savages should monopolize for hunting grounds, an extent of territory, which, under the cultivation of civilized men, might be made to support perhaps ten times as many millions; and accordingly the European nations founded their respective claims upon *the right of discovery*. On this ground, the greater part of what is now the territory of the United States, fell to the share of Great Britain, by virtue of the expedition of John Cabot, who, in 1495, under the auspices of Henry the Seventh, sailed along the eastern coast, from the 56th to the 38th degree of north latitude; and thereupon claimed for his sovereign, the whole vast region from the Gulf of Mexico to

(a) See the tenth lecture of Kent; the first volume of Story's Commentaries on the Constitution; Marshall's Life of Washington; Bancroft's History of the United States; Pitkin's History of the United States.

the Northern ocean, and from the Atlantic to the Pacific. It turned out, that France and Spain had superior titles to some portions of this domain; but for the rest, the claim of Great Britain was acquiesced in. No successful attempt, however, was made to establish *colonies* here, until 1606, when James the First granted a charter to certain of his subjects, which laid the foundation of the colonies of Virginia and Massachusetts. From this period, other colonies were successively established along the whole eastern coast; the last being that of Georgia, in 1732.

§ 11. *The Revolution.* The colonies were now thirteen in number; and though distinguished by their original organization, into *provincial*, *proprietary* and *charter* governments, they did not differ very essentially from each other, in their relations to the mother country. (a) As British subjects, they all brought from the mother country, the laws and institutions adapted to their condition. They all had local legislatures also; but being *dependent colonies*, and not independent states, they could make no laws repugnant to those of Parliament. The exact limits, however, of colonial dependency were never very precisely ascertained; and claims to supremacy asserted beyond the Atlantic, were often rejected here. At length Parliament, by way of preamble to one of its acts, asserted the unqualified right to bind the colonies in all cases whatsoever. But the colonies, while they admitted the general authority of Parliament, most resolutely denied it in the case of *taxation*. They held it to be a fundamental principle of British law, that taxation and representation go together; and since they were not represented in Parliament, they could not be taxed by Parliament. And the controversy which began upon this question, ended in the revolution which established our independence. But in order that three millions of people might resist, with any hope of success, a power upon whose dominions the sun never sets, it was necessary that they should act in perfect unison. The idea of co-operation had already been rendered familiar to the colonies, by the New England alliance, in 1643, for protection against the Indians; by a convention at Albany, in 1754, to discuss a plan of union against the French and Indians; and by a congress of nine colonies at New York, in 1765, to declare the rights of the colonies with reference to the mother country; but as yet, there was nothing like a permanent and efficient union. When, however, the determination to resist was unalterably taken, the first step was to form a *revolutionary league*. Accordingly, in 1774, the people of all the colonies elected delegates to represent them in a general *Congress*, (b) which, from its universality, was dignified with the

(a) For the distinguishing features of these several forms of Colonial Government, see 1 Story Const. 3—183.

(b) For an account of the organization and doings of this Congress, see 1 Story Const. 183—190; 1 Pitkin's Hist. U. S. chap. 8 and 9, pages 282—383. It was called

name of *Continental*; and which was the commencement of that glorious Union which we now enjoy. Passing over the earlier acts of this Continental Congress, the mind hastens at once to that sublime manifesto of the fourth of July 1776, which fixes the birth-day of our national existence. Upon the merits of the *Declaration of Independence*, (a) the highest terms of panegyric might be exhausted without extravagance; but this is not the proper occasion. The effect of declaring the "United Colonies" to be "free and independent states," was to make them so. For although it was not until the treaty of peace, ratified on the 15th of April 1783, that Great Britain "acknowledged the thirteen states to be free, sovereign and independent;" yet we universally regard the *declaration*, and not the *recognition* of our independence, as our true national era. From that moment, in the language of that instrument, "all political connexion" between the colonies and the mother country was "totally dissolved;" and from dependent colonies, they rose at once to the rank of independent states. But how far was this independence to extend? Were the states to be independent of each other, as well as of Great Britain? This was now an open question; for as yet there was no formal instrument of union. The bond of common danger would hold them together until the revolution should be consummated; but then it would be at their option to remain united or not. In a word, by dissolving their connexion with Great Britain, they so far placed themselves in a state of nature, that they could enter into whatsoever kind of social compact should be

on the recommendation of Massachusetts, and assembled at Philadelphia on the 5th of Sept. 1774. All the colonies were represented except Georgia, which came in the next year. They sat with closed doors, and each colony had one vote. One of their first acts was to adopt a declaration of rights. 1 Pitkin, 285. The members also unanimously signed an agreement for non-intercourse, to which they pledged themselves and their constituents, "under the sacred ties of virtue, honor, and love of their country." *Ib.* 289. They then prepared an address to the people of Great Britain, *ib.* 291; another to the King, *ib.* 293; and another to their constituents, *ib.* 297. It was of this Congress, and of these their doings, that Lord Chatham said—"For genuine sagacity, for singular moderation, for solid wisdom, manly spirit, sublime sentiments, and simplicity of language, for every thing respectable and honorable, the Congress of Philadelphia shine unrivalled. This wise people speak out. They do not hold the language of slaves; they tell you what they mean. They do not ask you to repeal your laws as a favor; they claim it as a right." *Ib.* 309.

(a) For the Declaration of Independence, see App. No. 1. On the 10th of May, 1776, Congress had adopted a significant resolution, reported by Mr. Adams, recommending to all the colonies, which had not already established governments for themselves, to do so without delay. The resolution for independence was moved by Mr. Lee, of Virginia, on the 7th of June. The committee appointed to prepare the Declaration, consisted of Messrs. Jefferson, Adams, Franklin, Sherman and Livingston. It was drawn up by Mr. Jefferson, approved by the committee, and reported to Congress on the 28th of June. For a brief sketch of the debates by Mr. Jefferson, see *Mad. Pap.* 9: and for the original draft of the Declaration, with the alterations made by Congress, see *ib.* 19. For a further account, see 1 Story Const. 190-1; 1 Pitkin's Hist. U. S., chap. 9, pages 360-370. The most important alteration made by Congress, was to strike out the entire clause reprobating the slave trade. *Mad. Pap.* 24.

most agreeable. (a) But fortunately this momentous question was settled before the common danger was removed. For on the 15th of November 1777, the Continental Congress, after long debate, agreed upon the *Articles of Confederation*, (b) and recommended them to the states for ratification. So great, however, was the opposition, that the ratification was not effected until the 1st of March 1781. This formed the second stage in the progress of our Union. And without attempting a particular analysis of these "Articles," I will refer to some of their leading characteristics. The union thereby created, though declared to be *perpetual*, was professedly nothing but a *league*, having for its object "the common defence and general welfare." In Congress the states were represented *equally*, each having one vote. The subjects of jurisdiction were enumerated, and the determinations of Congress were declared to be binding on the states. There was, however, no regular *judiciary*, and nothing resembling an *executive*, except a "committee of the states," to act during the recess of Congress. The radical defect, therefore, was the total want of power to *execute* what Congress might *direct*. The acts of Congress were not *laws*, as we understand the term; but merely *ordinances* or *requisitions*, operating upon the states in their *collective* capacities, and not upon individuals. Obedience depended solely upon the good faith of the states, and was often refused

(a) I am aware that this has always been a disputed point. There certainly was a national government *de facto* from the first meeting of the Continental Congress. And it is equally true that the Declaration of Independence was not the act of each colony separately, but of all united. Still, I think it clear that nothing more than a temporary union, dissoluble at the option of the states, can be considered as existing, prior to the Articles of Confederation. But see 1 Story Const. 191—208.

(b) For the Articles of Confederation, see App. No. 2. A plan of confederation had been submitted by Dr. Franklin, on the 21st of July, 1775, but was not acted upon. On the 11th of June, 1776, during the discussion of the question of independence, a committee of one from each state was appointed to prepare a plan. They reported, through Mr. Dickinson, on the 12th of July, 1776. Their plan was debated and amended from time to time, until the 15th of Nov. 1777, when it was adopted by Congress. Mad. Pap. 688—9; 1 Story Const. 209—216; 2 Pitkin's Hist. U. S. chap. 11, pages 9—19. Of the debates on these Articles, we have no full report. Mr. Jefferson has preserved a sketch of the debate on the quotas of contribution among the states, and also on the equality of votes in Congress. Mad. Pap. 27—39. The Articles were submitted to the legislatures of the states for approval, in which case they were to authorize their delegates in Congress to ratify them by signature. Much opposition was made in all the states, and the ratification, commenced on the 9th of July, 1778, was not completed until the 1st of March, 1781. The three last ratifications were, by New Jersey on the 25th of Nov. 1778, by Delaware on the 22d of Feb. 1779, and by Maryland on the 1st of March, 1781. The principal reason for this long delay was the claim made by some of the states to the vacant western lands. And it is probable that Maryland never would have come into the Union, if this obstacle had not been removed, by a relinquishment of these claims. 1 Story Const. 209—13; 2 Pitkin's Hist. U. S. chap. 11, pages 19—36. For a very clear analysis of these Articles, see 1 Story Const. 213—23. For a full exposition of the defects of this system, and a vivid description of the state of anarchy and despondency to which the country was reduced by it, see 1 Story Const. 224—50; 2 Marshall's Washington, chap. 4, pages 94—125; 2 Pitkin's Hist. U. S. chap. 16, pages 214—23.

with impunity. The consequence was, that the moment peace took off the pressure of a common danger, the Union was found to be too feeble to answer its design; and every day increased the prospect of a fatal dismemberment.

§ 12. *Formation of the Federal Constitution.* (a) In this

(a) For the Constitution, see App. No. 4. The convention at Annapolis was called for commercial purposes. The states represented were Virginia, Delaware, Pennsylvania, New Jersey, and New York. For the report of their proceedings, see Mad. Pap., 698. Its most important feature is the recommendation of a general convention to meet at Philadelphia, for the purpose of revising the Articles of Confederation. The day assigned was May 14th, 1787. A quorum of seven states did not appear until the 25th of May, when the convention was organized by the unanimous election of Washington for president. Mad. Pap. 721-2. New Hampshire was not represented until the 23d of July, and Rhode Island refused to take any part. The convention deliberated with closed doors. The yeas and nays could not be demanded. None but a member could inspect the journal, and he could not take a copy from it without leave. Nor could any thing spoken in the house be published or communicated without leave. But the most important rule of all was, that the voting should be by states. That this should have been assented to, without debate, by the large states, is a fact strikingly illustrative of the conciliatory temper with which those great men commenced their task—ib. 724-8. On the 29th of May the business of the convention was opened by Mr. Randolph, of Virginia, who offered a series of resolutions agreed upon by his delegation, which formed the groundwork of future debate—ib. 728-35. Mr. C. Pinckney, of South Carolina, submitted a plan, but it was not acted upon—ib. 735. Mr. Hamilton, of New York, prepared a plan, but did not submit it—ib. App. No. 5. The debate proceeded in committee of the whole upon Mr. Randolph's resolutions until the 13th of June, when nineteen were reported to the house—ib. 848. At this point Mr. Patterson, of New Jersey, brought forward what was called the *federal plan*, proposing merely to amend the Articles of Confederation by adding new powers, but not to alter the basis of that system—ib. 863. Both plans were referred to the committee of the whole, and after a warm debate, calling out a very full expression of opinion upon the merits of the two systems, the *national plan* of Mr. Randolph prevailed by a vote of 7 to 3—ib. 904. The debate proceeded in the house, until the 26th of July, when the resolutions thus far agreed upon were referred to a *committee of detail*, consisting of five members, who were to incorporate them into a constitution—ib. 1220. The convention then adjourned to the 6th of August, when the committee of detail reported a constitution—ib. 1226. This was discussed, section by section, until the 8th of Sept., when the whole was referred to a *committee of style*, consisting of five members, to revise and arrange what had now been agreed to—ib. 1532. This committee, on the 12th of Sept., reported the Constitution nearly in its present shape, together with a letter to accompany it—ib. 1543-61. Alterations and additions were proposed and discussed until the 15th of Sept., when the Constitution was agreed to and engrossed by a unanimous vote—ib. 1595. Only one alteration was afterwards made, which was to change the ratio of representation from forty to thirty thousand. Washington expressed himself in favor of this change, and this was the only time he took any part in the discussions—ib. 1599. On the 17th of Sept. the closing scene took place. Great efforts were made to procure a unanimous signature by every member—ib. 1596-1603. Of the fifty-five members, only forty-two were then present; and of these, thirty-nine did sign it. Messrs. Randolph, Mason, and Gerry alone refused—ib. 1623-4. The journal and other papers of the convention were then deposited in the hands of the president, to be kept by him subject to the order of Congress, if ever formed under the Constitution—ib. 1604-5. By order of Congress, this journal was published in 1821. But the only complete history of the doings of the convention is to be found in the Madison Papers, published by order of Congress, in 1840, from pages 721 to 1624 inclusive. For the circumstances under which this report of the debates was made, see pages 716-719. A very succinct account of the doings of this convention may be found in 2 Pitkin's Hist. U. S. chap. 18, pages 224-263.

state of things, a universal feeling of danger turned the thoughts of all patriots towards the establishment of a more perfect union. In 1786, at the instance of Virginia, a convention of five states assembled at Annapolis, and among other things, recommended a general convention, to amend the articles of confederation. Congress afterwards made a similar recommendation. The result was, that on the 14th of May, 1787, a convention of delegates appointed by the *legislatures* of all the states, except Rhode Island, assembled at Philadelphia. It was obviously impracticable to *amend* the articles of confederation so as to answer the purpose, because the evil to be cured, lay at their very foundation. Something more than a *league* was necessary. Accordingly the convention gave up this project, and proceeded to provide a substitute. The result was our present "Constitution of the United States," which was signed by the convention on the 17th of September 1787. The formation of a constitution, at all times an arduous work, was peculiarly so in this case. So strong was the general feeling against an efficient federal government, that the success of the undertaking is almost miraculous. It was agreed, at the outset, that the states should part with no more of their former powers, than was absolutely necessary in order to perpetuate their union. And there were two difficulties which could only be overcome by a magnanimous compromise of opposing interests; I mean the inequality of the states in respect to *size*, and their inequality in respect to *slaves*. How admirably these differences were adjusted, in fixing the federal relations of the states, will be explained hereafter. The convention, having completed the constitution, recommended that it should "be submitted to a convention of delegates chosen in each state by the *people* thereof, under a recommendation of its legislature, for their assent and *ratification*." The constitution itself provided that "the *ratification* of the convention of *nine* states should be sufficient for its establishment, between the states so ratifying the same." (a) Conventions were accordingly called in all the states; and it is not easy to conceive of a severer ordeal, than that to

(a) The first proposition in the convention was that the ratification should be by conventions appointed by the people, which passed by a vote of six to three. *Mad. Pap.* 795, 846. After a subsequent warm debate, a proposition to refer it to the state legislatures was negatived by a vote of three to seven; a proposition to refer it to one general convention did not pass to a vote; and the original proposition was reaffirmed by a vote of nine to one—*ib.* 1177—1185, 1468—74. In less than one year the constitution had been ratified by eleven of the states. North Carolina gave her assent in November 1789, and Rhode Island in May 1790—1 *Story Const.* 256—7; 2 *Pitkin's Hist. U. S.* chap. 18, pages 264—291. For a very full report of the debates in the conventions of several of the states, see *Elliott's Debates*. When the constitution was first submitted to the people, the chances seemed to be against its ratification; and perhaps we are indebted, for this happy consummation, mainly to that celebrated series of essays, written by Messrs. Hamilton, Madison, and Jay, for the *New York papers*, and afterwards collected and published under title of the *Federalist*. See 2 *Marshall's Washington*, chap 4, pages 126—7.

which this constitution was subjected, in these conventions. In most of them divers *amendments* were recommended, of which ten were afterwards adopted. In the course of one year, however, all the states, except North Carolina and Rhode Island, had given in their ratifications "in the name of the people thereof;" and these two shortly afterwards came into the great measure. Accordingly on the 4th of March, 1789, the new government, established by the federal constitution, went into operation.

§ 13. *The Public Domain.* (a) As yet the Union comprehended only the thirteen original states. But these occupy but a small portion of the territory now subject to the federal government. The entire surface of our country may be stated at fourteen hundred millions of acres; of which only about four hundred millions have as yet been appropriated; so that there are now about one thousand millions in the wild solitude of nature. This vacant territory is the exclusive property of the United States, subject only to the *Indian rights*, to be explained hereafter, and constitutes our *public domain*. In whatever light it may be viewed, it is a subject of surpassing interest. Who can foresee the consequences which may result from the possession of a vacant territory, more than twice as large as the whole organized portion of the Union? I shall consider the subject in two points of view; first, the acquisition of title; secondly, the scheme of survey and sale.

Acquisition of title. The United States acquired their title to the public domain in three ways; *first*, by succession to Great Britain; *secondly*, by cessions from the different states; *thirdly*, by purchase from foreign governments. The effect of the revolution was to transfer to the United States all the rights which Great Britain had acquired by discovery or otherwise, and had not then parted with. Accordingly, in the treaty of peace, the king expressly relinquished for himself and his successors, "all claims to the government, propriety, and territorial rights" of the thirteen states, and every part thereof. But so little was known of our topography when the grants were made to the different colonies, that besides being vague and often contradictory, some of them were highly extravagant in point of quantity. For ex-

(a) The conflicting claims to the vacant western territory formed one of the chief obstacles to a general union of the states under the Articles of Confederation. Those states whose colonial charters gave them no claim to any part of this territory, insisted that the other states should surrender their claims, and thus throw the whole into a common fund. Maryland made this an indispensable condition of her accession to the Union. In February, 1780, New York made the first movement by a cession of her claims. In the latter part of the same year, Congress made an earnest recommendation to all the states to follow her example, promising that the territory so relinquished should be disposed of for the common benefit of the Union, and formed into republican states; and that the expenses incurred by any state in relation to such territory, should be reimbursed. Virginia complied with this recommendation in January, 1781, and thereupon Maryland, on the first of March, 1781, without waiting for other sessions, ratified the Articles of Confederation. 2 Pitkin's Hist. U. S. chap. 11. pages 27—36.

ample, the descriptive words in the grant to Virginia, covered a tract four hundred miles in width, and extending from the Atlantic to the Pacific ocean. The grant to Connecticut was of a similar character, and the rest not greatly different. The consequence was, that immediately after the declaration of independence, conflicting claims to territory were set up by the several states, which threatened to prevent the formation of a permanent union. Impoverished as the states then were, and overburthened with debts contracted for the general good of the whole, it was reasonably claimed by many that this vacant territory, so unequally distributed originally, ought to be made a common fund for defraying the expenses of the war; and in this state of things, Congress, in 1781, made an appeal to the patriotism and magnanimity of the favored states, which had its effect. New York had already set the first example, by ceding to the Union all her claims; and this was imitated, at successive intervals, by all the other states. By these cessions, the United States derived their title to all that portion of the public domain which lies north of Florida, and east of the Mississippi river. Various conditions were attached to these cessions, but all agreed in this one, namely, that the territory thus ceded should be a *common fund* for the joint benefit of all the present and future members of the Union. This fact will serve to show the character of those claims which have been recently set up in some of the states, to the exclusive ownership of all the public lands which happen to fall within their territorial limits. Should Congress ever acquiesce to these claims, it would be a virtual forfeiture of the whole grant, by a breach of the condition annexed to it. But another mode of acquisition was by purchase. Although Great Britain originally claimed the region west of the Mississippi, it was finally decided to belong to France, and took the name of Louisiana. It was afterwards, for a short time, owned by Spain, and then again by France, until it was finally purchased by the United States in 1803. In like manner, Florida, which originally fell to Spain, was purchased by the United States in 1817. The power to make these purchases is no where expressly conferred by the constitution; but the importance of these acquisitions, particularly that of Louisiana, including as it does, the whole vast region beyond the Mississippi, together with the exclusive control of that mighty river, cannot be over-rated.

Scheme of survey and sale. Some of the earliest sales were negotiated directly with the treasury department. This was the case with the first two sales within the present state of Ohio, namely, the *Ohio Company's purchase*, made in July, 1787, and including nearly one million of acres, about the mouth of the Muskingum; and *Symmes' purchase* made in the autumn of the same year, and ultimately including about three hundred thousand acres between the two Miamies. Since then, however, the

scheme has been entirely changed, and its present outline is as follows. In 1812, the department of *public lands* was made a distinct branch of the treasury department, and placed under the control of a chief officer entitled *commissioner of the general land office*. The public domain is divided into *districts*, in each of which there is a *register* and a *receiver of the public moneys*. In each convenient number of districts, there is a *surveyor general*. The first step is to extinguish by treaty the Indian title, which is done through Indian *agents*. The territory is then surveyed into *ranges*, *townships* and *sections*, by means of lines always running with the cardinal points, but not including Indian reservations or navigable rivers. The townships are six miles square, and divided into thirty-six sections of one mile square. Thus a township contains twenty-three thousand and forty acres, and a section six hundred and forty. The sections are again subdivided into *halves*, *quarters* and *eighths*. The ranges, townships and sections are progressively numbered, and fractions have the same numbers as if they were whole. By referring therefore to the meridian assumed for the survey, and giving the number of the range, township, and section, we have a brief, and yet certain description of a given tract; and herein the scheme has immeasurably the advantage over that adopted by Virginia, in disposing of her reserved lands. There was no previous survey. *Warrants* were issued for certain quantities, to be *located* by the holders upon any tract not already occupied. These locations or entries, vaguely described, were registered and surveyed. The necessary result was extreme confusion, and uncertainty in the titles thus acquired. But under the federal scheme, no such evil can happen, because the land has been first surveyed. All things being now ready for sale, the land is first offered at auction for the *minimum* price of one dollar and a quarter per acre, and no credit. If not sold, it remains open to private sale at the land office in the district, on the same terms. On payment to the receiver, the purchaser obtains a certificate from the register, which is transmitted to the commissioner at Washington, and a *patent* issues to complete the title. Salt springs and lead mines are reserved to the United States. And in pursuance of a most liberal and enlightened policy, one section, numbered sixteen, in every township, making one thirty-sixth part of the whole, is appropriated by Congress for *education*. In the Ohio Company and Symmes' purchases, a section was also set apart for the support of *religion*, but this is not now done. Immense donations have likewise been made for colleges, and various internal improvements.

§ 14. *Territorial governments.* (a) When lands, not lying within the limits of any state, have been sold and settled, provision

(a) See 3 Story Const. 187-201; Mad. Pap. 1456-1466.

must be made for governing the inhabitants. This is done by creating territorial governments, dependent upon the federal government. The power to do this is contained in these words of the constitution: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, and other property belonging to the United States; and nothing in this constitution shall be so construed, as to prejudice any claims of the United States, or of any particular state." The first government of this kind was that of the "Territory north-west of the river Ohio," commonly called the North-western Territory, having for its southern boundary, the northern side of the Ohio river, at low water mark. (a) This territory included the present states of Ohio, Indiana, Illinois and Michigan, and part of the territory of Wisconsin; making a surface of about four hundred thousand square miles. It was embraced in the cessions of Virginia and Connecticut. The government of this territory was created by the celebrated *Ordinance of July 13th 1787*, (b) just prior to the adoption of the federal constitution. The whole region, with some trifling exceptions, was then one continuous solitude, upon which no laws had operated but the laws of nature. Here then was an unequalled opportunity for the establishment of an improved system of local law. No ancient rubbish was to be cleared away; no time-hallowed prejudices to be overcome. All was open and free, as an unsullied sheet, to receive the best impressions of legislative wisdom. Under such auspices, this ordinance was drawn up, by the late Nathan Dane, of Massachusetts, almost word for word as it now stands; and for brevity, comprehension, and forecast, it has no superior in the annals of legislation. Being the model of all subsequent territorial governments, it deserves a brief analysis. 1. By a few sweeping provisions, relating to the acquisition, descent, and transfer of property, it effectually excluded many of those feudal doctrines, which still encumber the laws of the older states. 2. It provided two grades of territorial government. The first grade consisted of a governor, secretary, and three judges, appointed by Congress, and other inferior officers. The governor and judges, in addition to their ordinary functions, were empowered "to adopt and publish" such laws from "the original states," as they should think proper, Congress retaining a negative. This grade continued until 1799, when the second commenced. A legislature was now added, consisting of a house of representatives, and a legislative council of five, upon whose acts the governor had an absolute negative. This legislature chose one

(a) See the case of *Handly's Lessee v. Anthony*, 5 Wheat. 375.

(b) For this Ordinance, see App. No. 3. For an account of it, see 3 Story Const. 187—190; 9 Dane's Abr. Appendix. For judicial constructions, see *Hogg v. Zanesville*, 5 Ohio 410; *Hutchinson v. Thompson*, 9 Ohio 52; *Spooner v McConnel*, 1 McLean's Rep. 337.

delegate to Congress, who had the privilege of debating, but not of voting. Thus far, this form has been substantially followed in all the subsequent territorial governments. 3. The most remarkable part of the ordinance is the six "articles of compact between the original states, and the people and states in the said territory;" which were designed "to fix and establish the fundamental principles of civil and religious liberty, as the basis of all future laws, constitutions, and governments;" and which were "forever to remain unalterable, except by common consent." These articles are worthy of a brief abstract. The *first* article asserts religious liberty in its widest extent. The *second*, after a series of declarations guarding personal liberty, contains the then new and original provision, that no law should interfere with private contracts previously made; which has since been adopted into all the American constitutions. The *third* declares the encouragement of education to be a binding duty of legislators. The *fourth* provides that the future states shall always remain a part of the United States; shall never interfere with the primary disposal of the soil by Congress; shall not tax the lands owned by the United States, nor non-resident proprietors higher than residents; and that the navigable waters, and the carrying places between them, shall for ever remain public highways. The *fifth* article provides that not more than five nor less than three states shall be formed within the territory, whose constitutions shall be republican, and conformable to these articles. The *sixth* article for ever prohibits slavery within the territory; but provides that fugitive slaves may be reclaimed from it. It is hoped that this abstract may be an inducement to examine this remarkable specimen of legislative wisdom.

§ 15. *Admission of new states into the Union.* (a) When territories have acquired the requisite amount of population, the next step is to admit them as states into the Union. The constitution declares that "new states may be admitted by the Congress into the Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures concerned, as well as of the Con-

(a) There was much diversity of opinion upon this subject in the convention. It was first resolved, that provision ought to be made for admitting new states without requiring an unanimous vote of Congress. Mad. Pap. 861. But it was repeatedly proposed to restrict them as to their right of representation, so that they might never out-vote the old states. It was said that they would be hostile to commerce, poor, uneducated, and wholly unfit to control the destinies of a great nation. Mad. Pap. 1034, 1053, 1070, 1095. It was then proposed that a majority of two-thirds should be required for their admission, but that they should be admitted on the same terms as the original states. Strenuous opposition was made to the equality of terms; but justice ultimately prevailed, and it was agreed that they should be admitted by a majority of votes, and upon an equality of terms. Mad. Pap. 1456—1466. And see 3 Story Const. 184—192.

gress." By this provision the whole subject of admitting new states, where other states are not interfered with, is placed under the control of Congress, with the single restriction, contained in another clause, that their constitutions must be "*republican*." Pursuant to this power, thirteen new states have been already admitted, and there are other territories preparing for admission. The result is that the centre of empire is rapidly moving westward, and the original states falling into a minority. For the sake of illustrating the action of Congress, I will describe the admission of Ohio. An act of Congress was passed for this purpose, on the 30th of April, 1802, which, after specifying the boundaries, and providing for a convention to frame the constitution, submitted three *propositions* for the acceptance of the state. These after some modifications were adopted as follows. 1. One full thirty-sixth part of the entire surface of the state, was to be vested in the legislature for the support of schools; and as the whole extent is about twenty-five millions of acres, this donation exceeds seven hundred thousand. It will be remembered that the present land scheme, which would have resulted in the same thing, was not then formed. 2. Certain salt springs which had been reserved by Congress, were to be given to the state, "for the use of the people thereof," and one township, for a college, pursuant to the contract with Symmes. Two townships had been previously given for a similar purpose, in the contract with the Ohio Company. 3. Three per centum of the net proceeds of the sales of public lands within the state, were to be appropriated to the construction of roads within the state and under the direction of Congress. These three propositions were based upon the *condition*, that the public lands within the state should be exempted from taxation for five years from the sale thereof. Such were the terms upon which Ohio came into the union. The convention, after only three weeks of deliberation, signed the *constitution* (a) on the 29th of November, 1802. It was of necessity submitted to Congress for approval; but was not submitted to the people for ratification. It bears some marks of the haste with which it was framed; but still more of the spirit of the times. Public sentiment was then inclining against what is called a strong government. And this constitution, accordingly, aims to govern as little through the medium of public agents, and as much through the immediate action of the people, in their primary capacity, as the nature of a representative government will admit. It may, in fact, be regarded as a fair experiment to ascertain the *minimum* of power necessary to be delegated to the people by their representatives.

(a) For this constitution, see App. No. 5. The convention assembled at Chillicothe on the 1st. of November, 1802. A large majority of the members belonged to the party friendly to the new administration of Mr. Jefferson. See preliminary sketch prefixed to 1 Chase's Ohio statutes 30—35.

It will thus be seen, that the power to admit includes the power to prescribe the terms of admission ; and this is equivalent to the power to refuse admission. When Missouri applied for admission, a large party in Congress were in favor of requiring slavery to be prohibited, as one of the conditions of admission ; and there would seem to be no question of the power of Congress so to do ; but in this instance, there was a majority the other way, and slavery was not prohibited. Again Michigan was required to assent to the boundary line claimed by Ohio, as one of the conditions of her admission. From all which it appears, that the people of a territory, seeking admission into the Union, are considered as asking a favor, rather than demanding a right. They indeed frame their own constitution, but it must meet the approbation of Congress. In a word, they are placed very much at the discretion of Congress.

LECTURE IV.

DIVISIONS AND DEFINITIONS. (a)

§ 16. *Municipal law—Rights.* In the two preceding lectures, we have taken a general survey of the organization of American society ; and we have seen that all the powers, which the people by their constitutions have conferred upon their respective governments, whether state or federal, have relation, directly or indirectly, to making, interpreting, and executing laws. Our future inquiries, therefore, will be directed to the following points : How are these laws made ? How are they interpreted ? How are they executed ? What laws may, and what may not be made ? What do the existing laws in fact provide ? When these questions shall have been answered, my task will be accomplished. But before proceeding to answer them directly, there are various preliminary explanations, definitions and divisions, by attending to which now, we shall greatly facilitate the proposed inquiries. To that object, therefore, this lecture will be devoted. According to Blackstone, “municipal law is a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.” This definition is imperfect, because it does not clearly distinguish between *moral right and*

(a) There are several works expressly devoted to definitions. See the Law Dictionaries of Bouvier, Jacob, and Tomlins ; Tayler's Law Glossary ; Termes de la Ley ; Kelham's Dictionary of Norman French ; Encyclopedia Americana. But, in general, the best definitions will be found in Blackstone.

wrong, and *legal or civil right and wrong*. Every law either commands something to be done, or regulates the manner of doing it, or forbids it. If it so happen that religion or morality forbids the same thing which the law forbids, we call that thing *malum in se*, or *wrong in itself*; otherwise, *malum prohibitum*, or *wrong because prohibited*. This very distinction shows that municipal law and moral law do not necessarily command or forbid the same things. In fact, many things are morally right, which the law does not command; and many things are morally wrong, which the law does not forbid. We have already seen that human government has nothing to do with moral conduct, apart from civil. It must, indeed, generally happen that these will correspond; and seldom, that they will conflict with each other. But the former belongs to a treatise on ethics, and the latter only to a treatise on law. We say then, in this view, that a thing is right or wrong, in a legal sense, because the law commands or forbids it; and it is to *rights and wrongs*, as thus explained, that our inquiries will be directed. But these again are correlative terms. A wrong always results from the violation of a right; so that by describing the one, you indicate the nature of its opposite. Again, *right* and *obligation* are reciprocal. The existence of a right in any person, imposes on all others an obligation to respect it. This obligation the law will always enforce, if the proper steps be taken; for it is a fundamental maxim, that for every right which the law recognises, it provides a *remedy* in case of violation. A treatise, therefore, upon municipal law, is, for the most part, a treatise upon rights and remedies, or upon wrongs and remedies, as one may choose to express it; and this suggests a remark upon Blackstone's primary division of legal subjects, into rights of persons, rights of things, private wrongs, and public wrongs. These expressions do not on their face, indicate that remedies are to enter into the discussion. Moreover the phrase, *rights of things*, *jura rerum*, by itself, conveys no definite idea; since all rights are the rights of persons; that is, they belong to persons, though they may have relation to other things. There is a distinction sometimes made in the books, between *natural rights*, or those which would have belonged to men in a state of nature; and *social rights*, or those which are created by the social compact. But this distinction is only a matter of speculative interest; since, under the compact, both are equally legal rights. There is however a division of rights, which, as citizens of a free and constitutional government, we should always bear in mind; I mean, *those which are defined by the constitution*, and *those which are not*. The former may be designated as *fundamental*; since they are made the foundation of our social relations, and cannot be altered by delegated power. The people alone in their sovereign capacity can change them, by changing the constitution. While the latter may be called *discretionary*,

since they depend upon legislative action. The idea of a formal *declaration* or *bill of rights*, (a) is not original in this country. England furnished the first example, in the celebrated *Magna Charta*, promulgated in 1225; since which epoch, the fundamental rights of her people have been several times solemnly declared; although they are still without a written constitution, as we understand the terms. In this country, the determination to have fundamental rights indubitably ascertained, so as to be beyond the possibility of cavil, has been at all times remarkable. We find it in the proceedings of the earliest colonial assemblies and congresses. In the Declaration of Independence, it appears in the most imposing form. The federal constitution was strongly objected to, because it did not contain a full and formal bill of rights; and though it did in fact contain many provisions of that nature, the first ten amendments were added to obviate this objection. In all the state constitutions, a like precaution has been taken. Our fundamental rights are thus imperatively declared, and placed beyond the usual fluctuations of opinion. What they are, will be explained in the sequel. It is sufficient here to say, that they operate as so many limitations of delegated power; and that they are as efficient for this purpose, as express prohibitions.

§ 17. *Written law.* (b) Such being the general nature of municipal law, its various kinds form the next subject of inquiry. The most general division of law is into *written* and *unwritten law*. But these are again subdivided, in this country, as follows. *Written law* consists of *constitutions*, *treaties* and *statutes*. *Unwritten law* consists of *common law* and *equity*. The general distinction between written and unwritten law is, that the former is regularly enacted and promulgated by the proper authority; while the latter is made up of judicial decisions without any formal enactment. I shall explain each of the above subdivisions, beginning with those of written law.

Constitutions. By a constitution we understand a solemn written declaration of the sovereign will of the people, defining the form and powers of government. This idea has been already sufficiently developed. But this definition would not apply to what is called the British constitution; for that is a mere collection of immemorial customs and traditions; and properly belongs to the division of unwritten law. The history of the formation of the federal constitution, and also that of Ohio, has been briefly traced; and their provisions will be examined in detail hereafter. Suffice it here to say, that the federal constitution unites the people of all the states into one nation, for all national purposes; in the same manner as a state constitution unites the people of one state, for municipal purposes; the one being a declaration of the

(a) See 1 Blackstone, 127; 2 Kent, lec. 24; 3 Story Const. 713.

(b) See 1 Blackstone, 85; 1 Kent, lec. 20.

sovereign will of all the people of the United States; and the other, of that portion of the same people constituting one state.

Treaties. (a) The making of treaties has not usually been considered as an act of legislative power. In England the treaty-making power belongs to the king alone. And by the common definition, a treaty is regarded merely as a solemn *written compact*, entered into between independent nations, to regulate their intercourse. Were this the American definition, our Indian treaties would form a partial exception, since we do not recognize the Indian tribes as wholly independent. But there is a provision in the federal constitution, declaring treaties duly made to be a part of "the supreme law of the land." Thus instead of being merely compacts, binding the nation at large, treaties are here made binding, like other laws, upon every individual. In this view, therefore, treaties may be strictly called the *written law of nations*. The power to make treaties is vested in the president with the concurrence of two-thirds of the senate. The first object is to secure secrecy and despatch; and to this end treaties are framed by the president alone, through his appropriate ministers; but in order to guard this high power from abuse, the assent of two-thirds of the senate is made necessary to their consummation. It has been made a question, whether the house of representatives have not an indirect negative power, by refusing to pass such laws as treaties may require; but in the two discussions which have taken place in Congress, the better opinion seemed to be, that by the ratification of a treaty the national faith is solemnly pledged to the enactment of every law necessary for giving it effect; and, therefore, that the house of representatives cannot properly refuse so to do. The making of treaties being one of the highest attributes of national sovereignty, the states are expressly prohibited from entering into "any treaty, alliance or confederation;" because they are not, in this view, recognized as nations. But with the assent of Congress, a state may enter into "an agreement or compact with another state or with a foreign power." This permission is understood to include nothing more than negotiations respecting matters of mere local concern, such as questions of boundary, and the like; and even these are invalid without the consent of Congress. The design is to take it out of the power of a single state to disturb, by its own act, the harmony of the Union.

Statutes. (b) By a statute we understand a law duly enacted

(a) It was first proposed in the convention, that the senate should have the treaty-making power, and that no treaty should be binding, until ratified by law. *Mad. Pap.* 1412-15. When the power was conferred on the president, it was proposed that it should be with the consent of both houses; but the considerations of secrecy and despatch, prevailed to vest the power in the hands of the president, with the advice of two-thirds of the senate. *Ib.* 1518-20. See also 1 Blackstone, 257; 3 Story Const. 354.

(b) See 1 Blackstone, 85; 1 Kent, lec. 20.

by the legislature. The mode of enactment will be considered hereafter. Statutes are either *public* or *private*. The former embrace the whole community; the latter only certain individuals or associations. The only important distinction is, that courts take notice of the former without special reference, but not of the latter. It is usual, however, to do away with this distinction, by inserting in private statutes a special clause declaring, that they shall be treated as public. The title or preamble of a statute properly forms no part of the law; but in case of doubt, may be referred to for explanation. Penal statutes are construed strictly in favor of him against whom they operate. Others liberally, according to the spirit and general intent. There are many rules of interpretation, but they are of little use. Common sense is the best guide; and it is to be regretted that the letter should ever be allowed to prevail against the spirit. In case of repugnancy between two statutes, the latest prevails, for it repeals the former. The general rule is, that when a statute which repealed another, is itself repealed, the other is thereby revived, without any express words; (a) but our legislature has wisely provided the contrary. The time when statutes shall take effect, is a matter of great importance. In England they formerly took effect, from the first day of the session; that is, before they were actually enacted, which is absurd. Here, unless some other time be provided, they take effect from their date; and consequently before they can possibly be known. In particular cases, this evil is obviated by specifying a future day; but by omitting to do this, great hardship is often occasioned. As it is the essence of the law that it should be known before it binds, there ought to be some general regulation, as in France, fixing a day so distant, that every person may know what is enacted, if he will. And in the mean time the most ample provision should be made for promulgation. I do not mean that copies should be sent to every citizen. This would be a useless expense, since all will not read them. But they should be so distributed as to be conveniently accessible to all. The duty of superintending their publication belongs to the secretary of state, who has the custody of the originals; and the general practice is to publish them in certain newspapers, as well as in pamphlets. Copies of the latter are furnished to public officers only. (b) Private persons are left to supply themselves as they may. This arrangement might answer the purpose, if legislation were reasonably stable; and from the provision made to secure deliberation, through the forms of enactment, we might naturally suppose that

(a) See *Commonwealth v. Churchill*, 2 Metcalf, 118.

(b) See 1 West. Law Jour. 37. By a recent amendment, laws of a general nature are to be printed immediately after the adjournment of the legislature; two copies are to be sent by mail to the common pleas clerk of each county, and two to each county auditor; and the latter is authorised, with the consent of the county commissioners, to contract for publishing them in two newspapers.

statutes would be so well considered, and carefully worded, that when once enacted, they might stand for years without alteration. Indeed this is for the most part true of the legislation of Congress; but our state legislation has been exceedingly fluctuating.

§ 18. *Unwritten law.* (a) It may sound strange to unpracticed ears that there should be such a thing as unwritten law; for if there be one thing, which, above all others, demands all the certainty and precision which human ingenuity can attain, it is the law which governs us. Accordingly the three divisions of written law which have just been described, are required to pass the most searching scrutiny before their consummation as written law. And the question may naturally be asked, why we should have any other? Having organized a distinct department of government for the sole purpose of enacting laws, why should we recognize any other than those thus enacted? It is indeed true, that our political theory seems, at the first glance, not to require, or even tolerate unwritten law. The very terms appear to involve an absurdity. They do not, however, signify oral law; but law which has never been enacted in the shape of constitutions, treaties, or statutes. And strange as it may appear, unwritten law, as thus described, constitutes by far the greater portion of that entire body of law by which our rights are regulated. It consists of two great divisions, *common law* and *equity*, each of which I shall describe, beginning with the former.

Common law. (b) This is said to be unwritten, because there is no record of its formal enactment. It is sometimes pretended that it consists of statutes worn out by time, their records having been lost. It is also called a collection of customs and traditions commencing in immemorial times, acquiesced in by the successive generations, and gradually enlarged and modified in the progress of civilization. The true account, however, is, that it is the stupendous work of *judicial legislation*. Theorize as we may, it has been made from first to last by judges; and the only records it ever had, are the *reports* of their decisions, and the *essays*, *commentaries* and *digests* founded thereon. To explain its formation, we may suppose a question to have arisen in England, centuries ago, respecting which the written law contained no provision. Upon presenting this question to the judge, he must either let a wrong go unredressed, or make a law to meet the exigency. He chose the latter alternative; and in making up his decision, sought light from every available source. If a case exactly similar had before been decided, he would naturally adopt the decision then made. Or if an analogous case could be found, he would adopt its principles so far as they would apply.

(a) See 1 Blackstone, 63—84; 1 Kent, lec. 21, 22; and a List of American and English Reports, in Appendix, No. 6.

(b) See 1 Story Const. 140, 142; 1 Ohio Rep. 245, 312; 2 Ohio Rep. 305; 8 Pickering, 309; 5 Peters, 233; 8 Peters, 687.

If neither of these, he would consult public policy and the abstract principles of natural justice. He would moreover be assisted by the arguments of the opposing counsel, who would present the case in all its bearings. With these aids, and in this manner, he would make up his decision; and if no sinister motives operated, the presumption is that it would be on the side of abstract right. Such briefly is the process by which the vast fabric of common law has been reared. A succession of judges, during a long lapse of years, have contributed the results of their reason and learning to elaborate and perfect it. In its *theory*, each successive adjudication has become a *precedent* for all similar cases involving the same principle; and it is obvious that just in proportion as precedents are multiplied, the number of unprecedented cases must be diminished. Legislation, moreover, has been constantly supplying deficiencies. It follows, therefore, that the field of judicial discretion, almost boundless at first, has been gradually but steadily narrowing. Still, however, admitting precedents to be absolutely binding, which is not the fact, though it is the theory, judges even at this day exercise a far wider discretion under the common law, than is usually supposed by those not conversant with the subject. And to this extent there is not that complete separation between the legislative and judicial power, which the theory of our government supposes.

The common law thus slowly matured into a system in England, was introduced into this country by the first colonists, together with the statutes by which it had then been modified, so far as applicable to their condition. This was at first a matter of necessity; and when the colonies became independent, the system, which in the meantime had been much improved under their own legislation, was retained from choice. The new states, with the exception of Louisiana, which has preferred the civil code, have adopted it from the old; so that the common law now prevails generally throughout the Union. Nearly all our technical terms and forms of proceeding, are borrowed from it and defined by it. Where a question arises concerning which our written law is silent, we consult the *reports*, beginning with those of our own state. We pass thence to the other American reports, and finally to the English reports, searching back to the earliest times. If none of these settle the question, we seek light from the civil law, or from any other source which can furnish it. The whole number of English reports, digests, abridgments, and other works, containing the common law, may be set down as eight hundred volumes; and the number of corresponding works in this country, at four hundred; so that the principles of common law are to be sought for through twelve hundred volumes. The epoch, down to which the English common law is to be received in this country, has been a matter of much doubt. Should it be the settlement of the country, the declaration of independence, or

the present moment? The general sentiment has been, that it should be the settlement of the country. In truth, however, there is a great reluctance in recognizing the English common law as of absolute and binding authority down to any period. The doctrine repeatedly declared by our judges, is, that they will be bound by it, only so far as they consider it suited to our state of society and form of government. The only certainty, therefore, is, that we have something which we call common law, scattered at random over a vast surface. But precisely what it is, or how far it extends, is hidden in the breast of our judges, and can only be ascertained by experiment.

Equity. (a) In its literal acceptation, equity is nearly synonymous with justice. But in its technical sense, it means *chancery law*, or that system of rules, by which courts of chancery are governed, in the administration of justice. It had its origin in the deficiencies of the ancient common law; which, by reason of the paucity of its then settled principles, and the inflexibility of its forms, could not so shape and modify its remedies, as to meet the circumstances of each particular case. When, therefore, the law furnished no remedy, or only an inadequate one; or when its rigorous enforcement would work positive injustice, the subject thus aggrieved, assuming the attitude of an humble suppliant, petitioned to the king in person, as the fountain of justice, for relief. But it soon became inconvenient for the king to give personal attention to these petitions; and he referred them to an officer of his household, called a *chancellor*. The office of chancellor, nominally derived from the Roman Empire, was at first purely ecclesiastical. The chancellor was the king's spiritual adviser or conscience-keeper, and had the custody of the great seal. Being of course distinguished for his learning and probity, it was natural that he should be thus selected by the king as the dispenser of his justice: and accordingly petitions were now addressed to him in the first instance. It therefore became necessary for the chancellor to adopt a system of rules and forms of proceeding; and as the civil law was then a part of clerical education, he borrowed from it as far as he could. Being at first without precedents, he acted according to his own ideas of natural justice, doing what he thought conscientiously right. He professed, indeed, to entertain jurisdiction of petitions, only when the law furnished no adequate remedy; but being the exclusive judge of this, comparatively ignorant of the common law, and one of a class notoriously ambitious to increase their power in the state, he construed this limitation very liberally. A writ of *subpœna* was soon devised, to bring parties complained of before him, which in those superstitious times, they feared to disobey;

(a) See 3 Black. ch. 47; 1 Kent, 489; 1 Story on Equity, ch. 1. 2; 9 American Jurist 227; and the Introductions to Jeremy and Fonblanque on Equity.

and thus a regular court of chancery became gradually established. As early as 1394, its authority was recognized by parliament, though no record is preserved of its proceedings, earlier than 1420. But in an age of bigotry, with the suffrages of the church in its favor, its influence extended so rapidly as to excite the jealousy of the courts of law; and about the year 1616 a bitter controversy grew out of this rivalry. By this time, however, the court of chancery, though built upon usurpations, was too firmly established, to be overthrown. But by way of concession to public sentiment, it gradually became separated from church influence, by the selection of chancellors from the most eminent lawyers. Under their administration, its rules and forms have been improved, extended, and systematized, until they constitute, under the name of equity, one of the most regular and important branches of jurisprudence. The chancery system thus matured in England, has been introduced into this country; not, however, so universally as the common law. In some of the states, as Pennsylvania and Massachusetts, only a few special chancery powers are conferred on the courts of law. While in others, as New York and Virginia, the entire system has been adopted. The federal and some of the state constitutions recognize chancery powers in their fullest extent, but require them to be exercised by the same tribunals which administer the law. The same persons therefore officiate both as chancellors and judges; but the two jurisdictions are kept as distinct from each other, as if administered by different persons.

The general nature of equity, and the points wherein it differs from law, strictly so called, cannot be fully explained, until we come to consider the forms of proceeding. It resembles the common law, however, in being a mere collection of principles, established by successive chancellors, during a long series of years, and treasured up in the reports of their decisions; and the precedents, thus established, are regarded as binding to the same extent as they are in law, but no further. Hence we perceive the fallacy of that popular notion, countenanced indeed by the early definitions, that equity consists in the application of moral principles to human transactions, without reference to positive regulations; that it addresses itself to the conscience of the chancellor, who administers relief whenever there is an honest claim; in short, that equity is something independent of law, and exercising a dispensing power over it. This may have been partially true at first; but conscience is now no more the guide of the chancellor than of the judge. Neither may decide according to his feelings. Such discretion would not be tolerated in any magistrate, under a free government. In fact, the highest conception that can be formed of either a judge or chancellor, would be that of a pure intelligence, fully comprehending all legal principles, and utterly divested of passion or sympathy. If a statue

could be imagined to have a mind, but no heart; an intellect, but no feeling; in a word, to be endowed with the single capacity of deciding unerringly what the law is, in every case; it would be a perfect chancellor, as well as judge; for just in proportion as this icy standard is approached, both become faultless ministers of justice, in their respective departments. But while equity agrees with law in being a system of precedents, it differs essentially in the modes of proceeding. These are so constituted as to administer remedies for which the forms of law are totally incompetent. Hence it is neither above law, nor opposed to it, but merely subsidiary, serving to supply its deficiencies and help out its designs. In general, two things are necessary to bring a case within chancery jurisdiction; first, the absence of an adequate remedy at law; and secondly, the existence of some enactment or precedent to meet the case. But these things will be more fully explained hereafter. Enough has been said to show that equity forms a branch of unwritten law, not inferior in importance to the common law, and equally the work of judicial legislation.

Civil and canon law. I have thus far made no mention of the *civil or Roman law*, or of the *canon or ecclesiastical law*, because neither possesses any intrinsic authority in this country, except a select portion of the former in Louisiana. Yet as both are sources from which much of our unwritten law has been derived, they merit a brief description. By the *civil law*, (a) then, is meant the body of Roman law, compiled and digested under the direction of the emperor Justinian and his successors. It consists of three principal divisions. 1. The *Institutes*, in four books, which contain the elementary principles of law carefully arranged, and designed principally for students. 2. The *Pandects*, in fifty books, which contain a methodical digest of the writings and opinions of the most celebrated jurists. 3. The *Code*, in twelve books, containing the imperial edicts and decrees, to the time of its date. To these must be added the *Novels*, containing the edicts and decrees of subsequent emperors, and forming a supplement to the compilations of Justinian. These compilations therefore embody the wisdom of the Romans in jurisprudence for about twelve hundred years.

By the *canon law*, (b) is meant the body of ecclesiastical law compiled from the opinions of the early Latin fathers, the ordinances or decrees of general councils, and the bulls of the holy see. But this body of law is far less interesting to us than the civil law, because, in our total separation of church and state, its influence

(a) See 1 Blackstone, 80; 1 Kent, lec. 23; Gibbon's Roman Empire, ch. 44; Justinian's Institutes, by Cooper; Domat on the Civil Law, by Strahan; Irving's Introduction; Ayliffe's Pandects; Brown's Civil and Admiralty Law.

(b) See 1 Blackstone, 82—85; Brown's Ecclesiastical Law; Rogers' Ecclesiastical Law. There is an American republication of the English Ecclesiastical Reports in six volumes, edited by E. D. Ingraham, of Philadelphia.

has been almost entirely done away. Yet in questions relating to marriage and divorce, and to the settlement of the estates of deceased persons, we still have occasion to refer to this body of law.

§ 19. *Codification.* (a) Before leaving this subject, it may not be improper to say a few words upon the project of diminishing the importance of unwritten law, by enlarging the boundaries of written law. And first, is this practicable? In answering this question, it is sufficient to consider unwritten law merely as a collection of legal principles, no matter how established, or whence derived. Can these principles be reduced to precise language, and arranged in systematic order? For if so, they can be enacted into a code. Now operations precisely similar, and equally arduous, have been performed in every other art and science. The great difficulty has always been to find out the principles, not to arrange them; but here the principles exist in the *reports*, and the numerous *digests* and *abridgments* would greatly facilitate the construction of a code. We are not left, however, to speculation and conjecture. The thing has been done, and therefore can be done again. It is sufficient to refer to two experiments. When Justinian ascended the Roman throne, the laws had been accumulating in the same way as ours, for ten centuries, and were contained in some thousands of volumes. Yet he found commissioners to construct, from this confused mass of materials, a clear, connected, and beautiful system of law. And in the strong language of Gibbon, "while the vain titles of the victories of Justinian are crumbled into dust, the name of the *legislator* is inscribed on a fair and everlasting monument." Almost the same remarks apply to the splendid achievement of Napoleon. When he ascended the French throne, the task of legal reform was as imperiously called for, and not less arduous. But to such a man, difficulty seemed in itself a temptation. He, too, found commissioners to frame an admirable code; and in his own vigorous language, he "will go down to posterity with that code in his hand." But we need not go abroad for examples. Codes justly renowned have already been framed for Louisiana. And, to take partial examples, our constitutional law has been codified to the admiration of the world, while that of England still remains unwritten, a heavy mass of doubtful precedents. And yet for this great work our fathers had no models, and scarcely materials. Again, the criminal law both of the United States, and of this state, has been likewise codified; and our citizens thereby enjoy the inestimable privilege of being able to find on a few pages of the statute books, every offence for which the hand of

(a) See 1 Hoff. Leg. Out. 454. Bentham on Legislation; Grimke's Report to the Legislature of South Carolina; Story's Report to the Legislature of Massachusetts; 1 West. Law Jour. 433.

justice can punish them. The idea of impracticability can only arise from a misconception of what is actually proposed. Did the project contemplate the formation of a code absolutely perfect so as to anticipate all future cases, this would indeed transcend finite capacities. For in the ever-multiplying relations of human affairs, the imagination cannot reach forward to the time when new cases will not arise. But this is not the proposition. Nothing more is sought than to incorporate into a code, existing principles, and this has been shown to be practicable. A difficulty, however, has been suggested of another sort; namely, that when commissioners should have prepared a code, a legislative sanction could not be procured. The idea is, that the numerous members of a legislative body could never be brought to unite upon any code, when to a single mind there would be no difficulty. It is indeed probable, that many of the members would not carefully examine its provisions, and could not appreciate them if they did. But a personal inspection by every member would not be expected. This is not the way in which such bodies usually transact their business. They inquire and examine through their appropriate committees, and rely upon their reports. They might do so in this case. For greater security, there might be successive committees from year to year; and then, if time should disclose errors, they could be readily corrected by future legislatures.

In the next place, then, is the project expedient? There are some objections on this score, which first require to be answered. *First*, it is said that we might lose much that is really excellent in the unwritten law. The fact would seem to be otherwise. The proposition is to search thoroughly, once for all, the voluminous records of unwritten law, and abstract therefrom all the principles which are worthy of being retained. But the search need not be confined even within this range. The records of all human experience might be explored; and wheresoever in the codes of ancient or modern lawgivers, a legal principle could be found suited to our condition, it could be adopted. In this way, so far from losing, we should take the surest method of preserving all the scattered gems of jurisprudence. *Secondly*, it is said that we should effect a great, sudden, and of course disastrous change in legal rights, a kind of civil revolution. But this does not follow. The proposition is not to reverse the law, but simply to change it from unwritten to written law. Not one legal principle need be altered, unless the public good require it. *Thirdly*, the time and expense may be deemed an objection. No doubt it would require much of both. The best exertions of the best minds, in a long and arduous labor for the public, ought to be well rewarded. But when accomplished, the work would be beyond all price. Moreover the cost would probably be saved in a single generation by the reduced expenses of litigation. Let us then advert to some of the positive advantages of such a code;

and *first*, our laws would be better adapted to our condition than they now are; since that part of the unwritten law which is suitable only for barbarians, would be of course rejected, and no longer cumber our legal repositories. *Secondly*, our laws would be more generally known, for the inquirer would no longer have to search for them through a thousand volumes, and then haply not find them. *Thirdly*, they would be more simple. If statutes are not easily understood, it is the fault of those who frame them, in not using clear method, and plain language. All needless technicalities which now lumber up the books, would be avoided. *Fourthly*, our laws would be more certain than they now are, and it has often been said that the certainty of law is more important than the reason of it. The only uncertainty which need belong to statutes, is that which arises from the imperfection of language. There would be no balancing of authorities, or arguing about fitness. The only question would be, what has the legislature enacted? Not so with unwritten law. For though in theory precedents are binding, yet in point of fact, judges do not regard precedents as absolutely imperative, like statutes, but rather as lights to aid their discretion, and inform their judgment. They sometimes overrule their own prior decisions, and very often the decisions of other courts, insomuch that an immense collection (a) of *overruled cases* has already been published. And how is even this source of uncertainty increased, by promulgating such a doctrine as that already referred to in Ohio, that the unwritten law is binding only so far as it is adapted to our condition? Ought we to depend, to such an extent as this, upon the discretion of any set of men? *Lastly*, our laws would be more conformable to the theory of our government, which vests legislative power in the legislature alone, and not in the judiciary. But I have not time to pursue the subject. The question of codification is by no means clear of difficulty, though abundantly deserving of serious consideration.

§ 20. *Divisions of persons.* (b) Having now enumerated the various kinds of law, let us next advert to the subjects upon which law operates. These are, as we have seen, *persons* and *property*. But both persons and property are distributed by law, into various divisions and subdivisions, which I shall here briefly indicate; beginning with *persons*. 1. The law distinguishes between *natural* and *artificial* persons. By a natural person is meant simply a human being. By an artificial person is meant a *corporation*, consisting of one or more natural persons, endowed by law with certain attributes not possessed by natural persons; among which are, unity and indivisibility of name and purpose, and continuity of succession and duration, unaffected by change

(a) See Greenleaf's Cases Overruled.

(b) See the first book of Blackstone, for these divisions and definitions.

of members. The law creating a corporation, and called its *charter*, imparts to it various other capacities according to its objects, which will be described hereafter. 2. The law distinguishes between *public* and *private* persons. Public persons include all those who occupy official stations; and will be described in connection with the departments of government. All other persons are private. 3. The law distinguishes between *citizens* and *aliens*. Citizens include all persons born within the United States, and all persons duly *naturalized*. The process of naturalization will be described hereafter. All other persons are aliens. 4. The law distinguishes between *males* and *females*. Females have no political capacities whatsoever; that is, they have no direct voice or agency in the formation or administration of government. But while they remain unmarried, their legal capacities are the same as those of the other sex. When married, they are placed under various disabilities, which will be described when we come to speak of *husband and wife*. 5. The law distinguishes between *infants* and *adults*. Infants or minors, in this state, include all males under twenty-one years of age, and all females under eighteen. In most places, twenty-one is the age of majority for both. All other persons are adults. Infants have no political capacities at all; and they are placed under various legal disabilities, which will be described hereafter, under the heads of *parent and child*, and of *guardian and ward*. 6. The law distinguishes between persons *sane* and *insane*. Insane persons comprehend all those persons who are totally or partially deprived of reason. They are placed under various legal disabilities, which will be described under the head of *idiots and lunatics*. 7. The law distinguishes between *masters* and *slaves or servants*. Slaves include those persons bound by law, to involuntary and perpetual servitude, unless manumitted by their masters. They will be described hereafter. Persons voluntarily bound to service, or bound only for a limited time, will be described under the head of *master and servant*. 8. The law distinguishes *Indians* from all other persons. They are placed under various disabilities, both political and legal, which will be described hereafter. 9. The death of an individual gives rise to various legal distinctions. If he has disposed of his property by *will* or *testament*, he is called *testator*; the persons taking his property, *legatees* or *devisees*; and the person appointed by him to settle his affairs, *executor*. If he has left no will, he is called *intestate*; the persons designated by law to take his property, *heirs*; and the person appointed by court to settle up his affairs, *administrator*. All these relations will be enlarged upon hereafter.

§ 21. *Divisions of property.* (a) From the divisions of persons, we pass to those of *property*. The term property includes

(a) See the second book of Blackstone, for these divisions and definitions.

every valuable thing which can be made the subject of exclusive ownership; and the laws which regulate the acquisition, enjoyment and disposition of it, form a large part of the laws of every society. I shall here barely enumerate the various kinds of property, and define the terms employed to designate them. 1. The most general division of property, is into *things in possession*, and *things in expectation*. The former are readily understood. The latter consist of legal rights, and their corresponding obligations. If I have a legal right to any specific thing of which you are in possession, or to receive from you something valuable, but not specific, and you will not voluntarily fulfil the legal obligation resulting from my right, I may enforce performance by a series of legal proceedings to be explained hereafter, constituting a *suit or action*. The result therefore of an action, is to transfer into possession what was before in expectation; and the certainty of this result, is what gives value to this class of things; hence they are denominated *things in action*; or, retaining the French term, *choses in action*. Of this description are all rights resulting from *contracts*, which will occupy a wide space in our future inquiries. It is sufficient here to say, that as commerce and credit increase, this kind of property increases proportionally; and it already forms an immense item in the account of individual and national wealth. 2. The next division of property is into *things real* and *things personal*. These terms, of themselves, afford no intimation of the things for which they stand; there being just as much of *reality*, and as little of *personality*, in the one as in the other. On this account, the terms *moveable* and *immoveable*, which are used in the civil law, would be better. For personal property includes every valuable thing of an unfixed and moveable nature, so that it can follow the person of the owner; and the terms employed to designate it, are *goods* and *chattels*; or, in the abstract, *personalty*. While real property includes every valuable thing of a fixed and immoveable nature, so that it cannot follow the person of the owner; and the terms employed to designate it are, *lands*, *tenements*, and *hereditaments*; or, in the abstract, *realty*. But although *immobility* is the distinguishing characteristic of realty, an *indefinite* duration of interest also enters into the idea; and therefore certain determinate interests in land, as leases for years, are called *chattels real*; because, although they have that immobility which is denoted by the term *real*, yet for want of an indefinite duration, they are treated as *chattels*. 3. Real property is divided into *things tangible* and *things not tangible*. The term *land*, includes only what is tangible; that is the soil itself, and every tangible thing permanently connected therewith, by nature or art, to an indefinite extent above and below the surface. Hence there are various articles of personalty, which become realty by being annexed thereto; and these are called *fixtures*. The term *tenement*, is more comprehensive; since it includes, not only land, as above defined, but

certain intangible rights or privileges connected with land, but not belonging to the same person; as a right of way, a right of fishing, and the like. The term *hereditament*, was once more comprehensive still. By the ancient law, though personalty was not descendible from ancestor to heir, yet there were certain articles of personalty, not fixtures, such as family pictures, tombstones, and the like, which by custom did descend along with the family mansion. These were called *heir looms*, and were included in the term hereditaments, which comprehend every thing inheritable. Probably the law of this country does not recognize heir looms; and if so, the term hereditament comprehends no more than tenement. However, the division of realty now under consideration, is commonly expressed by *corporeal hereditaments*, and *incorporeal hereditaments*; the former including land only, as above defined; and the latter, all intangible rights annexed to land. These last are likewise denominated *easements*.

§ 22. *Divisions of time.* (a) I shall conclude this lecture with a few remarks on the legal divisions of *time* and *place*, beginning with those of *time*. About forty-five years before Christ, Julius Cæsar undertook to reform the method of computing time; and his substitute is called the *Julian Calendar*. In this calendar the twelve months, and the number of days in each, were arranged as at present; but the year commenced on the 25th of March, and contained 365 days and six hours. These extra hours make one day in four years; and accordingly a day was interpolated after the 28th of February, every fourth year, which is called *bissextile* or leap year. This calendar continued in use until 1582, when Pope Gregory undertook another reformation. The Julian year was found to be too long by eleven minutes and ten seconds, which amounts to a day in about 130 years. An error therefore of ten days had now occurred; accordingly in that year, ten days were struck out from the month of October, and the day next after the 4th was reckoned the 15th. And to provide against the recurrence of a like error, it was ordained that in three centuries out of four, the last year should not be a leap year. Thus the years 1700, 1800, 1900, are not leap years; but 2000 is. There is still a small error, but it will not amount to a day in 3000 years. The computation of the Gregorian calendar is called *new style*, and the year begins on the 1st of January. In England and America, the new style was not adopted until 1752. The term *month*, in legal computation, is somewhat ambiguous. The English rule seems to be that where a statute uses the term month, simply, it means a *lunar month* of 28 days; while the phrase, a *twelvemonth*, means a solar year, and not

(a) See 2 Blackstone, 141; Herschell's Astronomy, chap. 13; 7 Com. Dig. tit. Temps; 15 Petersd. Abr. tit. Time; 4 Kent's Com. 95; Glassington v. Rawlins, 3 East. 407; the King v. Cumberland, 4 Nev. & Man. 378; Pierpont v. Graham, 4 Wash. C. C. R. 232; Arnold v. U. S. 9 Cranch, 104.

forty-eight weeks, and that the same holds true in contracts and other legal instruments, except where custom has created a different understanding, as in commercial paper. But in this country, the common understanding is, that month means *calendar month*, unless the contrary is expressed. The legal *day* begins at midnight; and fractions of a day are never noticed, except in questions of priority, as in recording deeds, and the like. Hence it has been held that an infant becomes of age on the day before his twenty-first birth day; but this is questionable. Where computation is to be made from an act done, the day of doing the act is included, except in case of a bill of exchange payable so many days *after sight*, when the day of sight or acceptance is excluded. But where a bill is payable so many days *after date*, the day of date is included. In a deed or lease, where the expression, "from" or "after date," is used to pass an interest, the day of date is included; but where it is used as a terminus from which to compute time, it is excluded. In general where notice of an act is required to be given a certain number of days before the act, the day of notice is included, and the day of the act excluded.

§ 23. *Divisions of place.* (a) I come lastly to the *divisions of place*. The division of the whole Union into states and territories, has been sufficiently explained. It remains, therefore, only to describe the subdivisions of a state. The first division is into *counties*, for the purpose of municipal regulation. Our state constitution empowers the legislature to lay off new, or alter old counties, with this limitation; that no new county can be laid off, which will be of less extent, or make that from which it is taken of less extent, than four hundred square miles. The object of this provision is not very manifest. It would seem better to have made *population* the criterion. As it is, the most populous city can never make a county by itself. Every part of the state, whether settled or not, belongs to some county. The municipal organization of counties will be described hereafter. Counties are again subdivided into *townships*. The power to lay off new, or alter old townships, is vested by our law in the county commissioners, with this limitation; that no township can be laid off, of less extent than twenty-two square miles, unless it includes a "town corporate." By a town corporate is here meant a *city* or *borough*, specially incorporated by the legislature, with peculiar powers and privileges; whereas a township, by being properly laid off and named, becomes thereby incorporated, without a special charter. Its boundaries are recorded in a book kept for that purpose, among the county archives. Cities and boroughs always belong to some township, and fall under its municipal regulations, except when their charters otherwise provide. Townships, therefore, are the only divisions of counties, which fall within the general municipal scheme.

(a) See 1 Blackstone, 114.

PART II.

CONSTITUTIONAL LAW. (a)

LECTURE V.

RELATIONS OF THE STATES.

§ 24. *The Federal Government is not a league.* From the views which have been presented in the preceding lectures, it is obvious that our fundamental law is to be sought for in our constitutions. Our country claims the transcendent merit of having made the first grand experiment of limiting delegated power by written constitutions; and accordingly constitutional law is a branch of study to which the American student should devote himself with patriotic ardor. Fortunately for him, the facilities for this study are now abundant. The text itself is found within a small compass; for comprehensive as our constitutions are, they are as remarkable for their brevity: and the commentaries and precedents are numerous and ample. Not a word has been left unexplained; and where room has been found for difference of opinion, both sides of every question have been presented with all the force and clearness, of which the subject is susceptible. With all these lights to guide the student, it must be his own fault if he do not make himself more thoroughly acquainted with constitutional law, than with any other branch of legal study. Under these circumstances, perhaps I should do wisely to leave him to the guides I have named, and hasten to other branches where instruction is more wanted. But on the whole, I have concluded to give an epitome of constitutional law, as necessarily introductory to our future inquiries. It is obvious that the most remarkable feature in our political organization, is the complex character which results from the existence of state governments under a federal government. Had we but a single representative government, framed upon the general principles before indicated, how simple would be the study of constitutional law, compared with

(a) On the subject of constitutional law, see the American constitutions; Story's Commentaries; 1 Kent, lec. 10—19; Madison Papers; Federalist; Adams' Defence; the treatises of Rawle and of Sergeant; and the decisions of the U. S. Supreme Court, of which, those delivered by Chief Justice Marshall, have been published in a separate volume.

what it now is. To adjust the relations which the states should sustain to the federal government, in such a manner as to prevent future collision, and preserve general harmony, was undoubtedly the most difficult problem that ever presented itself to the framers of government. And accordingly, before we proceed to consider in detail the provisions of the federal and state constitutions, it is important that we should obtain distinct notions of the relations in which the states are actually placed by our federal organization.

And *first*, the federal government is not a league of the state governments; but emanates from, and expresses the sovereign will of all the people of the United States, in their original and aggregate capacity.(a) And herein consists the great and radical dif-

(a) To be satisfied that this was the understanding of the convention, it is only necessary to read the debate of the first two days; during which it was resolved, that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary; that the legislature ought to consist of two branches, and that the members of the first branch ought to be elected by the people of the several states. These resolutions clearly point to the creation of a new system, and not to an amendment of the old; and were so regarded by the members. *Mad. Pap.* 746—761. The same views were again expressed in the debate upon the motion, that the first branch should be elected by the state legislatures, which failed by a vote of 3 to 8—*ib.* 800—808. But the following facts remove all doubt upon this point. On the 13th of June, the committee of the whole reported nineteen resolutions to the house, asserting the fundamental principles of the new system—*ib.* 858. Instead of these, Mr. Patterson, of New Jersey, proposed to substitute a series of resolutions, simply amending the articles of confederation—*ib.* 862. The two plans were debated until the 19th of June, when Mr. Patterson's plan was rejected by a vote of 7 to 3; and all the subsequent debates proceeded upon the hypothesis, that an entirely new system of government was to be provided—*ib.* 904—928. Probably the ablest exposition yet given of the nature of the federal government, is to be found in the debate in the U. S. senate, on Foote's resolution, in Jan., 1830—and see 1 *Story Const.* 279—343. But the general nature and construction of federal powers will be best understood by reading the following quotations from opinions delivered in the Supreme Court of the United States. In 1 *Wheaton*, 324—7, Judge Story says:—"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."—"The government of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases,

ference between the present *government*, and that *league* or *confederacy* to which it succeeded. On this point there would be no room for doubt, had the federal government been organized prior to, or simultaneously with the state governments; as, without

unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.”—"The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."

In 5 Wheat. 48-9, Judge Story says:—"The constitution, containing a grant of powers in many instances similar to those already existing in the state governments, and some of those being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms, to Congress, does, *per se*, transfer an exclusive sovereignty to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, unless when the constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases, not falling within the cases already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being 'the supreme law of the land,' are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."

In 6 Wheat. 413-14, Chief Justice Marshall says:—"That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

any inherent difficulty, might have been the case. But as the state governments were previously in existence, it may be well to exhibit the proofs that they were not the creators of the federal government, and that the people of the whole Union were. And *first*, the constitution itself, which is the highest authority that can be appealed to, expressly declares its origin, in these words of the preamble: "We, *the people of the United States*, do ordain and establish this constitution." Had it been the work of the states, this declaration would have been a falsehood, and would not have been allowed to stand. *Secondly*, the constitution was *ratified by the people*, through their delegates in conventions, as we have already seen, and not by the state legislatures; and the ratifications all purport to be in the name of the people. *Thirdly*, the federal government operates directly upon the people as individuals, and not, like the old confederation, upon the states collectively. So far, then, as respects the mere derivation of federal powers, they are of precisely the same character, as if the state governments had never existed, or had been annihilated by a complete consolidation of all powers in one general government. And every citizen of the Union is as much a constituent of the federal government, as of his own state government. But, although the federal government thus derives its efficiency from the whole people, as the primary source of power, it nevertheless employs the agency and influence of the state governments in several of its operations. This, however, does not conflict with the proposition before laid down, because the very power of the state governments to exert this agency and influence, is conferred on them by the federal constitution, and is not an original state power. This will be evident from a bare statement of some of the particulars in which this agency is employed. And, *first*, by way of concession to the small states, the general principle of proportionate representation is departed from, so as to give all the states an equal representation in the senate; and, for the sake of convenience, the state legislatures, and not the people, elect the senators. (a) *Secondly*, for similar reasons, each state, however small, is allowed at least one representative; and for the rest, instead of apportioning the representatives among the aggregate population of the whole Union, they are apportioned "among the several states," omitting any fractions below the adopted ratio. *Thirdly*, by way of concession to the slaveholding states, they are allowed a greater representation than their free population would entitle them to, by adding three-fifths of the slaves. *Fourthly*, for the sake of

(a) The mode of electing senators was much disputed in the convention. A proposition, that they should be elected by the other house, was negatived by a vote of 3 to 7. A proposition, that the executive should appoint them, did not pass to a vote. A proposition, that the people should elect them, was negatived by a vote of 1 to 10. The election of them by the state legislatures was first agreed to unanimously, and afterwards by a vote of 9 to 2. Mad. Pap. 759, 814, 820, 821, 959.

convenience, the states determine the qualifications of electors of representatives; and the time, place, and manner of elections. *Fifthly*, for the same reasons of concession and convenience, the states elect the electors of president and vice president, the number of whom is equal to the number of senators and representatives belonging to each state. And if the election goes before the house of representatives, the states have an equal vote. Now, it is evident, that in all these respects a different arrangement might have been made, so as to dispense with state influence or agency. Its actual existence therefore proves nothing as to the origin of federal powers.

§ 25. *It is designed for national objects only.* (a) The federal government is designed to unite the people of the United States into *one nation* for *national purposes* only; leaving all other matters to the control of the state governments. This is evident, not only from the history of its organization already narrated, but also from the enumeration of objects in the preamble itself. These are, *first*, "to form a more perfect union;" *secondly*, "to establish justice;" *thirdly*, "to insure domestic tranquillity;" *fourthly*, "to provide for the common defence;" *fifthly*, "to promote the general welfare;" and *sixthly*, "to secure the blessings of liberty." These are all national objects, equally affecting all the members of the Union; and in no sense local or municipal, as distinguished from national. And the truth of the proposition will be still more manifest, when we come to consider the powers enumerated in the constitution, as the only powers which the federal government can exercise. We shall then find the number of powers to be small, and adequate only to effect objects in the strictest sense national. In fact, there was the strongest reason for extending the federal government thus far, but no reason for extending it further. The state governments were already in existence, and fully competent to manage their internal concerns; and it would have been folly to burthen the federal government with such details. Indeed had there been no state governments before, there would have been the same reason for creating them, in aid of the federal government, as there is for dividing states into counties, or counties into townships; namely, the extreme inconvenience, if not absolute impossibility, of extending the federal arm to all the minute concerns of each particular district. Accordingly, without adverting to the strong jealousy which prevailed at the time, respecting *state rights*, and which continues to this day, we find sufficient reason on the score of expediency alone, for reserving to the states the entire control of their internal affairs.

(a) In the first draft of the constitution, the declaration of supremacy was confined to acts of Congress and treaties. The supremacy of the constitution was afterwards inserted by a unanimous vote. Mad. Pap. 1234, 1408; Story Const. 693—701.

§ 26. *It is supreme with respect to those objects.* But the federal government, though limited in the *number* of its objects, to those which are national, is nevertheless *supreme* in regard to those objects; and in cases of conflict the state governments must yield, being thus far *subordinate*. This would have resulted necessarily from the nature of the two governments; but to avoid all shadow of doubt on so momentous a subject, this supremacy is declared by the constitution itself in these explicit terms. "This *constitution*, and the *laws* of the United States, which shall be made in pursuance thereof; and all *treaties* made, or which shall be made under the authority of the United States, *shall be the supreme law of the land*; and the judges in every state shall be bound thereby, any thing in the *constitution* or *laws of any state* to the contrary notwithstanding." It would be difficult to devise language stronger than this. The latter part may almost be considered supererogation; for the subordination of the state governments would have followed as a necessary consequence, from the supremacy of the federal government. And in the same spirit, the next clause requires all state, as well as federal officers, to bind themselves, by oath, to support the federal constitution. "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution." (a) The relation, therefore, of supremacy and subordination is completely established by the constitution itself; and the result is the four following gradations of authority. *First* and paramount over all, is the federal constitution; *secondly*, treaties and acts of Congress; *thirdly*, state constitutions; and *fourthly*, acts of state legislatures. With respect to these four degrees of subordination, the invariable rule is, that in case of conflict, the lower must yield to the higher; each degree being subordinate to those which go before, and superior to those which come after. Thus, in order to be valid, treaties and acts of Congress must conform to the federal constitution; state constitutions must conform to the federal constitution, treaties, and acts of Congress; and the acts of state legislatures must conform to all these, and to their particular state constitution. This idea of subordination among laws, springs from the very nature of written constitutions, limiting delegated power; and our federal organization only renders it somewhat more complicated. It is, therefore, unknown, where written constitutions are unknown. In England, for example, there is no such thing. Her parliament is omnipotent; and the validity of its acts cannot be called in question.

(a) Mad. Pap. 845, 1175. The debate in the convention turned upon the question, whether this oath should be required of state officers, which was carried by a vote of 7 to 4.

§ 27. *The Judiciary is the final arbiter.* (a) In order to preserve the subordination thus declared, the *judiciary* is empowered to decide, in the last resort, when either government has transcended its constitutional limits, and to declare such proceeding void. It has indeed been claimed, that this power may be exercised by any one of the states, with respect to those acts of the federal government, which that state deems unconstitutional. This is one of the doctrines of what is denominated *nullification*; and its existence would seem to indicate that the constitution had not been sufficiently explicit on a matter so important. But, on the contrary, its language is as clear and decisive as it could be made. "The *judicial power* shall extend to *all cases* in law and equity arising under this *constitution*, the laws of the United States, and treaties made under their authority." (b) This language confers the whole power of deciding constitutional questions upon the judiciary; and of course nothing is left to be exercised by any other tribunal. It is then the high function of the federal judiciary, to arrest the arm of either branch of government, when it would overstep its prescribed limits, and encroach upon the precincts of the other. And in its subordinate sphere, the state judiciary exercises a similar power. Some have complained of this, as a departure from the democratic theory, in allowing a less number of men to annul the acts of a greater number. But experience has thus far shown the arrangement to be wise and salutary. It is indeed one of the noblest features in our system. One cannot easily conceive of a more sublime exercise of power, than that by which a few men, through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly, and fearlessly, proceed to set aside the acts of either government, because repugnant to the constitution.

§ 28. *The states are not completely sovereign.* It follows from what has now been said, that the states have ceased to be *supreme* or *sovereign*, in the strict sense of these words, since there is a power above them. The particulars in which they have parted with their sovereignty, include all the powers *exclusively* vested in the federal government, and all the powers prohibited by it to the states. These will be fully enumerated hereafter. For the present, it is sufficient to say, in general terms, that the states have ceased to be sovereign in relation to all national objects, but retain a qualified or partial sovereignty, extending to all internal objects. If there could have existed any doubt on this point, as the constitution was originally framed, such doubt was removed by the tenth amendment, which declares "that the powers not delegated

(a) See 1 Story Const. 344—381.

(b) This clause, as originally reported to the convention, did not include the constitution or treaties. Mad. Pap. 1238. These were afterwards added by a unanimous vote; and the reason assigned was, that there might be no doubt as to the power of the judiciary to expound the constitution in all cases of a judicial nature. Ib 1438.

to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This language, while it makes the people the source of all power, both in the federal and state governments, expressly subtracts from the sovereignty of the states, all the "powers delegated to the United States," and "prohibited to the states;" but leaves the states sovereign in regard to their "reserved powers." Again, the states are not altogether *foreign* with respect to each other. This is evident from the views already presented, since they are parts of the same nation. But I will here state several of the more important particulars in which they have ceased to be foreign, by the express provision of the constitution. *First*, no state can refuse to give "full faith and credit to the public acts, records, and judicial proceedings" of every other state. The importance of this provision will be more fully explained in the sequel. It must be observed, however, that this provision is not intended to interfere with the great international doctrine, that no state is bound to recognize the laws of another state, affecting either persons or property within the former. No laws can have, as a matter of right, an extra-territorial operation. If, therefore, we give effect to the laws of other states or nations, it is on the principle of *comity*, and this principle prevails to a very wide extent in modern times. I have only room here to say, that with this general doctrine, the above provision does not interfere. The states are still left to give effect or not, to the laws of their sister states, on the principles of comity, established by their respective legislatures, or received as common law. *Secondly*, the "citizens of each state are entitled to all the privileges and immunities of citizens" in every other state. In other words, citizenship is made a national affair, as it should be, and the states can make no discrimination in this respect, between their own people and those of other states. *Thirdly*, no state can refuse to deliver up fugitives from justice or from service, escaping from other states, whereas between foreign nations, this is a question of comity. *Fourthly*, the states cannot enter into any treaty, alliance, or confederation, or adopt any commercial regulations, with respect to each other. *Fifthly*, the states cannot at pleasure secede from the Union. This is no where expressly declared in the federal constitution, but it results necessarily from the fact that the obligations it creates are without reservation as to time. The Union was no doubt intended to be perpetual. The preamble declares one of the objects to be, "to secure the blessings of liberty to ourselves and our posterity." Provision is also made to prevent the states from ceasing to be represented in Congress, should they have such a desire. Besides, if a state could withdraw at pleasure, the Union, instead of being "a more perfect union," as the preamble declares, would be no stronger than a rope of sand. No doubt the ultimate right of revolution exists in every state, for nothing can take it

away. And if one or more states were strong enough to stand out against the rest, they might thus make an effectual secession. But they could not do it in virtue of any reserved right under the constitution, unless they amounted to three-fourths of the states. Then they might amend, and of course destroy, the constitution. But in no constitutional way can a minority separate themselves from the Union. There is much looseness both of opinion and expression upon this subject. The declaration of independence seems to place the right of revolution upon its true foundation; namely, the failure of government to accomplish the end of its institution, that is, the welfare and happiness of the people. And whenever a majority of the people are satisfied that they can better their condition by changing their government, they have the right as well as the power to do so. Any less number would seem to want both. So long, therefore, as a majority of the people of the United States are contented with the existing government, the minority must acquiesce.

§ 29. *Classification of constitutional provisions.* Having thus referred to the most prominent points in our federal relations, I will now indicate the plan to be pursued in our future inquiries. Since all the states stand in the same position with respect to the federal government, and have the same internal objects to promote, it follows that there must be a strong similarity in their constitutions. Of course one will serve as a sample of the whole, and for reasons before given, I shall select the constitution of Ohio, and explain its provisions in connexion with those of the federal constitution. The provisions of any constitution naturally class themselves under four general heads; namely, *first*, those which relate to the organization of the legislative department; *secondly*, those which relate to the organization of the executive department; *thirdly*, those which relate to the organization of the judicial department; and *fourthly*, those which define and limit the powers delegated and the rights reserved. Of these four classes of provisions, the first three are so nearly alike in the federal and state constitutions, that they can be expressed in almost the same language. These, therefore, will be examined in immediate connexion. But with respect to the fourth class of provisions, namely, those which limit delegated power, there is a very important difference, which I will here explain. The federal government being designed, as we have seen, for national objects only, and these being comparatively limited in number, it was not impracticable to enumerate specifically, the substantive or primary powers requisite for their accomplishment. These are called *enumerated powers*. But as it was not so easy to foresee, nor so convenient to enumerate all the secondary or subordinate powers, which might be required as means for executing those primary powers, they are conferred generally and without enumeration; and are called *incidental powers*. As these two

classes include all the powers conferred on the federal government, there is of course an implied prohibition of all other powers. In other words, the theory of the federal constitution is, that the grant of powers is special, and the prohibition general. But out of abundant caution, that nothing connected with so momentous a subject might be left in doubt, some special prohibitions are inserted, which form another class, entitled *powers prohibited to the federal government*. Again, in order to prevent those conflicts with the state governments which might otherwise result from the federal scheme, it was necessary to prohibit the exercise by them of various powers, to which they were originally competent; and thus we have another class, entitled *powers prohibited by the federal constitution to the states*. Accordingly, in the federal constitution we have for consideration these four classes of powers; namely, enumerated powers; incidental powers; powers prohibited to the federal government; and powers prohibited to the states. But the state constitutions are much more simple. In framing them, the design was to confer powers sufficient for all the details of municipal arrangement. Of course it was impossible to enumerate, or even to provide all the powers requisite for objects so various; and accordingly no specific enumeration was attempted. Power is conferred, in the first place, in general terms; and then specific prohibitions are inserted, with respect to the powers intended to be withheld. In other words, the theory of the state constitutions is, that the grant of power is general, and the prohibitions special; being the exact reverse of the theory of the federal constitution. In the federal constitution, all powers are to be considered as prohibited which are not expressly or incidentally conferred; and in the state constitutions, all powers are to be considered as conferred, which are not expressly or incidentally prohibited. From all which, it follows, that in order to ascertain the limitations of state power, we must add to the prohibitions of the federal constitution, those of the particular state constitutions; and the aggregate of these two sets of prohibitions will constitute the limitations of the power of the state in question. It must be observed, however, that there are several powers, which, either from their nature, or from the language of the federal constitution, may be exercised concurrently by the federal and state governments; and hence we have another class of powers entitled *concurrent powers*. Such then are the classes of provisions which constitute the fourth head before mentioned; namely, those which define and limit the powers delegated and the rights reserved. In discussing these, however, it will sometimes be convenient to treat them all in connexion, and sometimes to treat them separately, according to their subject-matter.

LECTURE VI.

LEGISLATIVE DEPARTMENT. (a)

§ 30. *Division into two branches.* In pursuance of the plan suggested in the preceding lecture, I shall, in this lecture, discuss the provisions of the constitution, relating to the legislative department. The legislative power of the United States is vested in a

(a) The history of the convention in relation to this department, is as follows. The first resolution adopted was, that there should be a supreme legislative, judiciary, and executive. Mad. Pap. 749. It was next resolved, that the legislature should consist of two branches. At first, Pennsylvania alone objected to this, out of regard to Dr. Franklin's opinion; but the final vote stood 7 to 3—ib. 753, 925. It was next resolved, that the representatives should be elected by the people. This was warmly opposed by several, who were in favor of an election by the state legislatures, but was carried by a vote of 5 to 2—ib. 757. A proposition, that senators should be elected by the representatives out of persons nominated by the state legislatures, was negatived, 3 to 7—ib. 759. It was then resolved, that each branch should have the power to originate laws, and that the legislative power should extend to all cases to which the state legislatures were individually incompetent, and to a negative of state laws contravening the national laws—ib. 759—761. A proposition, authorizing an exertion of the force of the whole against a delinquent state, did not pass to a vote—ib. 761. A proposition, that the state legislatures should elect the representatives, was negatived after warm debate, 3 to 8—ib. 800—8. The mode of electing senators again came up; and a proposition, that the executive should appoint them out of persons nominated by the state legislatures, did not pass to a vote; that the people should elect them, was negatived, 1 to 10; and that they should be elected by the state legislatures, was carried unanimously—ib. 812—21. A proposition, that Congress should have a negative on all state laws was negatived, 3 to 7—ib. 821—8. Thus far there had not been a great diversity of opinion. But now the rule of suffrage in Congress came up. In the continental congress, and that of the confederation, and in this convention, the states had an equal vote.—Should it be so under the new constitution? The parties were nearly equally divided, and the debate was warm and protracted. The first resolution, adopted by a vote of 7 to 3, was, that the rule of suffrage in the house should not be as under the confederation, but according to some equitable ratio of representation—ib. 830—42. The next, adopted by a vote of 9 to 2, was, that this ratio should be according to a census, including the free inhabitants and three-fifths of the slaves; this being the rule of contribution proposed in 1783 under the confederation, and agreed to by eleven of the states—ib. 842—3. The next, adopted by a vote of 6 to 5, was, that the same ratio should prevail in the senate—ib. 843. The mode of choosing senators was again debated, and election by the state legislatures affirmed, 9 to 2—ib. 945—59. The term of service for a representative was first fixed at three years, by a vote of 7 to 4, and then at two years, by a unanimous vote—ib. 848, 931. The term for a senator was first fixed at seven years, by a vote of 8 to 1. Afterwards, opinions ranged between four and nine years, except that some were for the term of good behavior; but six years was adopted by a vote of 7 to 4—ib. 853, 960—9. The rule of suffrage in the house again came up, and, after a long and animated debate, equality among the states was rejected, 6 to 4—ib. 974—96. But by way of compromise, equality in the senate was proposed. This was debated with great earnestness, and lost by a tie vote—ib. 996—1016. The fate of the convention was now at its crisis. Happily, the whole matter of suffrage in Congress was referred to a committee of one from each state, who reported the following compromise, namely, in the house, one representative for every forty thousand, including three-fifths of the slaves, but each state to have one; an equal representation in the

Congress, consisting of a *Senate* and *House of Representatives*. A similar arrangement exists in all the states, though until recently Vermont was an exception. We have already seen that the motive for dividing legislative power in this manner, is to obtain the utmost security for its being faithfully and beneficially exercised. The idea is not original in this country. We had a well-tryed example in the structure of the British Parliament. And although from the absence of privileged orders, we have not the same materials as there exist, for constituting two bodies with really distinct interests, yet it is obvious that if the two bodies were alike in every particular, the mere necessity of their independent concurrence in every legislative act, would afford more security than if there were but a single body. To some extent, they must necessarily act as a check upon each other, and the efficiency of this check will be increased, in exact proportion as these two bodies can be differently constituted, either with respect to their numbers, their mode of election, or their term of service; in all which particulars it will be seen that the senate and house of representatives differ from one another. In fixing the number of each house, the aim has been to secure a medium between too large and too small, in both; and at the same time to establish a difference between the two, by making the senate smaller than the other house. Accordingly, the number of federal representa-

senate; and a prohibition to the senate either to originate or amend money bills—ib. 1016–24. The various parts of this compromise were debated for several days, with sundry references to other committees—ib. 1082–1108. With respect to the ratio in the house, a specific apportionment was proposed for the present, with power in Congress to regulate it in future, upon the combined principles of wealth and population—ib. 1036–51. The specific apportionment was modified and agreed to—ib. 1053–6. The rule of future apportionment was first agreed to, 9 to 2; but afterwards the proposition of a periodical census brought up the slave question—ib. 1053–63. A proposition to consider slaves equal to freemen, was negatived, 3 to 7; and after warm debate upon the proper basis of representation, whether wealth, or numbers, or both, and whether slaves or not, a periodical census was unanimously negatived—ib. 1069–79. It was then resolved, 6 to 2, that representation should be according to direct taxation, and that both should be determined by a census to be taken every ten years, including three-fifths of the slaves—ib. 1086. The part of the compromise giving an equal vote in the senate, was adopted, 6 to 3; and that relating to money bills, 5 to 3—ib. 1045–47. On the whole compromise, as thus adjusted, the vote stood 5 to 4.—ib. 1107–8. The small states considered this as a triumph. The large states were dissatisfied. A breaking up was talked of. The convention adjourned for one day. Out-door meetings were had, and the next day, the business of the convention was resumed—ib. 1109–13. The proposition of three senators from each state, was negatived, 1 to 8, and two agreed upon unanimously; and the proposition, that they should vote *per capita*, and not by states, was adopted, 9 to 2—ib. 1185–6. Such was the scheme of the legislative department, as it appeared in the first draught of the constitution—ib. 1226–9. The ratio for the house was modified so as not to exceed one for every forty thousand; which, on the last day of the session, was changed to thirty thousand—ib. 1263, 1599. The proposition to confine the ratio to free inhabitants was negatived, 1 to 10—ib. 1266. The restriction of the senate as to money bills was stricken out, 7 to 4—ib. 1273. But upon subsequent debate it was reinstated, with the modification, that the senate might amend, but not originate them—ib. 1305–16. On the general subject of this department, see the 11th lecture of Kent; the 7th–13th chapters of Story's third book; and the 2d chapter of Blackstone's first book.

tives can never exceed one for every thirty thousand constituents; while every state, however small, must have at least one; whereas the federal senate can only consist of two senators from each state. This equal representation of the states in the senate, is a compromise in favor of the small states, whose influence is in a measure swallowed up in the other house; and in this respect, the constitution is declared to be unalterable. Thus simply and admirably was one of the strongest objections to our present federal organization completely obviated, by departing, in the construction of the senate, from the principle of proportionate representation. With regard to the state legislatures, a similar difference is made in the number of the two bodies. In Ohio, for example, the number of representatives can never be greater than seventy-two, nor less than thirty-six; and the number of senators cannot be greater than one-half, nor less than one-third of the number of representatives.

Apportionment. The federal method of apportionment is the result, partly of compromise, and partly of convenience. The provision is in these words—"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers; which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." The slave-holding states demanded a greater portion of representatives than, by the rule of uniformity, their free population would entitle them to; and they were willing, in return for this advantage, to bear a like proportion of the general expense, so far as supplied from direct taxation. This compromise was assented to by the non-slave-holding states; and thus another threatening obstacle to the formation of the present government was patriotically overcome. For the purpose of apportionment, a *census* or enumeration is made every ten years, the last being in 1840; and after each census, it devolves upon Congress to determine the number of representatives for each state, according to the directions of the constitution. The process originally adopted, was, first, to fix a ratio of representation within the limit before mentioned. This ratio forms the common divisor for the representable population of each state, as ascertained by the census, pursuant to the slave compromise; and the quotient, rejecting fractions, is the number of representatives for each state. By this process, therefore, if a state happen to have such an amount of population, as to leave a remainder but one less than the assumed ratio, this entire remainder must be unrepresented. But how can this evil be avoided, consistently with the words of the constitution just quoted, "among the several states, according to their respective numbers?" It has been proposed to modify the above process thus. First agree upon the whole number of representatives. By this divide the

aggregate representable population of the Union, to obtain the ratio of representation. Then proceed as before, giving to each state the nearest whole number thence resulting; that is, when the remainder is greater than one half the ratio, adding one to the quotient. The result would be that some of the states would have one more, than by the former process; but taking the aggregate, there would be no unrepresented fractions. This process was twice proposed, and strongly recommended, as more equitable than the other; but it was rejected as unconstitutional. The last act of Congress, however, has so far adopted this modification, as to provide for the large fractions. As to state representatives and senators, their apportionment presents no difficulty. In Ohio they are apportioned among the counties, according to the number of white male adults; for which purpose an enumeration is made every four years.

§ 31. *Elections.* Under this head I shall speak first of the qualifications of electors, and secondly of the time, place, and manner of elections.

Qualifications of electors. (a) In regard to federal representatives, this matter was left by the constitution, to the determination of each state, on the principle that no more power was to be conferred on the federal government, than was necessary to effect its objects. It is moreover a matter of convenience, because the states are not uniform in this respect; some adopting *restricted*, and others, *universal suffrage*. There is however this limitation, that the qualifications must be the same as for electors of state representatives; in order that the states may not be tempted to pervert this power. In Ohio the qualifications of electors are the same for all purposes of voting. 1. The voter must be a white (b) male adult. 2. He must be a citizen of the United States. 3. He must have resided within the state for one year preceding. 4. He must not have been convicted of a penitentiary offence, unless afterwards pardoned. 5. He must have paid or been charged with a state or county tax, or have labored on the road; and the tax cannot be a *poll* or *personal tax*, because that is prohibited in Ohio; but it may be a road tax in place of labor. Such are the liberal terms upon which the right of suffrage is exercised in Ohio. In some of the states, property qualifications are required. We seem to have chosen the wise medium. On strict democratic principles, I see not how this most precious of all our rights, can be rendered much less than universal. Who would ever consent to a government, which he could have no voice in framing or directing?

(a) In the convention a freehold qualification for electors was debated, but it was afterwards unanimously agreed to leave the whole matter to the states. Mad. Pap. 1249—56.

(b) The construction given to the word "*white*," is that it only excludes negroes and mulattoes. *Jeffries v. Ankeny*, 11 Ohio, 372; *Thacker v. Hawk*, 11 Ohio, 376.

Time, place, and manner of elections. (a) With regard to federal senators and representatives, these are likewise left, in the first instance, to the determination of each state, for the same reasons as above stated. But in order to prevent the states from defeating the federal government, if they should be so inclined, by neglecting to make the necessary provisions, a supervisory power over these matters is reserved to Congress, except as to the place of electing senators; which, being the place of meeting of the state legislature, ought not to be under the control of Congress. As yet, however, there has been no occasion to interfere with the state regulations, except that the last law requires the states to elect by districts, instead of general ticket. In Ohio, these regulations are the same as for the state officers generally; and I shall here briefly describe them.

1. As to the *time*. Federal representatives and state senators and representatives are elected on the second Tuesday of October. This is the general election-day for all but township officers, who are elected on the first Monday of April. Federal senators are elected on such day as the assembly may agree upon for each case.

2. As to the *place*. Every township is an election district; and elections are held at such places therein, as the trustees may direct.

3. As to the *manner*. This may be considered under several heads. 1. All elections are *by ballot*, written or printed, and not by oral declaration. The ballot must not contain more names than the office requires, but may contain fewer, if the voter so wishes. 2. In all elections by the people, a *plurality*, and not a majority, determines the choice; and where two or more candidates have an equal and the highest number of votes, the choice is determined *by lot*. But in all elections by the assembly, a majority is necessary to a choice. 3. The polls are only open for one day. They are under the management of three judges, who are the township trustees; and two clerks, of whom one is the township clerk, and the other is appointed by the judges. Each clerk keeps a *poll-book*, in order that there may be duplicates, in which the name of every voter is entered as he puts in his vote. The votes are not inspected until the final counting after the polls are closed. The name of each candidate, and the number of votes, are then entered in the poll-books; one of which, being signed by the judges and clerks, is deposited with the township clerk, and the other delivered under seal by one of the judges, to the clerk of the court of common pleas of the county. With the assistance of two justices of the peace, he makes out an abstract of the returns of the county, and forwards it to the secretary of state. Certificates of election thereupon issue to the successful candidates. Where elections are contested, each house is made the exclusive judge, for its own members, and provides the mode

(a) See *Mad. Pap.* 1297, 1282.

of decision. 4. Federal senators are elected by joint ballot of both houses of the assembly; and not by the separate ballot of each. It has been doubted whether this is constitutional; since, as a legislature, the two houses must act separately; and in some of the states they act separately in elections. 5. Federal representatives, and state senators and representatives, are elected *by districts*, and not by *general ticket*; and for this purpose, after each apportionment, the state is divided into congressional districts, and assembly districts, as nearly according to the number of white male adults, as can be done, without dividing counties. The chief advantage of this system over that by general ticket, is, that each citizen stands a chance to know the candidate he votes for; and is not required to vote for those he cannot know. 6. To guard against abuse or fraud, each voter may be put upon oath as to his qualifications; and bribery and imposition are made penal offences.

§ 32. *Qualifications of members.* (a) With respect to federal senators and representatives, these are prescribed in the federal constitution; and it is presumed that the states are precluded from adding any other. A federal representative must be twenty-five years of age; an inhabitant of the state which he represents; and for seven years a citizen of the United States. A federal senator must be thirty years of age; an inhabitant of the state which he represents, and for nine years a citizen of the United States. No person holding any office under the United States, can be a representative or senator, during his continuance in office. It has been decided that a person does not lose his residence by being absent on public business. It is also to be remarked, that the federal constitution does not require a representative to reside in the district which he represents; this being left to the determination of each state.

The qualifications of state senators and representatives in Ohio are very similar to the above. A representative must be twenty-five years of age, and a citizen; must have resided one year in the county; and must have paid a state or county tax. A state senator must have the same qualifications, except that his age must be thirty, and his residence in the county two years. And no person can be a state senator or representative, who holds any

(a) The qualification of age was carried by a vote of 7 to 3. Mad. Pap. 936-7. It was proposed in the convention, that there should be a qualification of landed property. Landed was stricken out, 10 to 1, and a property qualification carried, 8 to 3—ib. 1215-16. The proposition, to make public debtors and those having unsettled accounts with government ineligible, was negatived, 9 to 2—ib. 1217. Seven years' citizenship for representatives, was carried by a vote of 11 to 1—ib. 1257. A certain period of residence in the state, varying from one to seven years, was negatived—ib. 1257-60. For senators, a citizenship of fourteen years was strongly urged, but nine years was adopted, by a vote of 6 to 4—ib. 1273-9. On a subsequent day, the question of a property qualification was debated and lost, 3 to 7—ib. 1282-7. The period of citizenship was again warmly debated, but left as before—ib. 1299-1305.

office under the United States, or any "lucrative office" under the state; with the exception of justices of the peace and militia officers. The words of our constitution are, that none of these excluded persons "shall be eligible as a candidate for, or have a seat in the general assembly." Consequently they must resign before they can even be candidates; otherwise votes cast for them, would be absolutely thrown away as blanks. Another provision very properly excludes public defaulters, so long as they continue in default. We have also a statutory provision excluding from "offices of honor, trust or profit," persons convicted of penitentiary offences, and not pardoned; but it is doubtful if this excludes members of the legislature, because they are not generally spoken of as "officers." Of the qualifications now described, as well as of the elections and returns, each house is made the exclusive judge, because the power could be no where else so conveniently deposited.

§ 33. *Term of service.* The term of service was a matter of great delicacy. A long term would not sufficiently secure responsibility. A short term would incur the danger of that fluctuation and instability, to which popular governments have always been liable. At the same time it was desirable to make a difference between the two bodies, in order to secure as great a variety of influences as possible. To accommodate all these views, federal representatives are elected for two years, (a) and federal senators for six. (b) But to remove all cause for apprehension on account of the long term allotted to senators, an arrangement was made by which one-third should be elected every two years. For this purpose, the first senate was divided by lot into three classes, taking care that both senators from one state should not be in the same class. The first class went out at the end of two years, and the second at the end of four years; and as each class went out, their places were supplied by a new election. The result is, that every second year, one third of the senate, and all the house of representatives, are newly elected. This occurs every odd year; and the successive Congresses thus formed have been designated numerically, the Congress of 1843 being the twenty-eighth. Views somewhat similar have prevailed in the state constitutions. In Ohio, for example, the representatives are elected for one year, and the senators for two years: and by an arrangement like the preceding, one-half of the senators are elected every year. The term of service in all these cases is an *integral* term; so that when a vacancy occurs, by death, resignation, or otherwise, the person elected to fill it only serves out the unexpired term; and

(a) The convention first fixed upon three years. Some were strenuous for one year. The term of two years was finally acquiesced in unanimously. Mad. Pap. 848, 931.

(b) The convention first fixed upon seven years. Afterwards, opinions ranged between four and nine years; and after a very animated debate, the term of six years was carried by a vote of 7 to 4. Mad. Pap. 853, 960-9.

vacancies are supplied as follows. For a federal representative, or a state senator or representative, the governor, by proclamation, orders a special election in the vacant district, which is conducted in the manner before described. For a federal senator, (a) if the vacancy occur during the recess of the assembly, the governor makes a temporary appointment, to expire at its next session. Otherwise the assembly fills the vacancy at once.

§ 34. *Duties, powers, and privileges of members.* There are several provisions connected with the *duties, powers, and privileges* of members.

1. *The time of meeting.* (b) Both Congress and our Assembly are required to meet at least once a year; and this must be on the first Monday in December; unless a different day shall be appointed by law, which has not been done. On extraordinary occasions, also, the executive may convene them by proclamation.

2. *Privilege from arrest.* While going, attending, and returning, the members are "privileged from arrest," for any cause except "treason, felony, and breach of the peace," which terms are construed to include all criminal offences; so that the exemption from arrest extends only to civil matters; and to this extent its propriety is too obvious to need comment.

3 *Freedom of debate.* The words are, that "for any speech or debate, they shall not be questioned in any other place." The design is to secure independence *in debate only*; and therefore the privilege extends only to what is spoken in debate. If a libellous speech be published, the member is answerable as in other cases.

4. *Security against corruption.* (c) To this end it is declared that no member "shall, during the time for which he was elected, be appointed to any civil office, which shall have been created, or the emoluments whereof shall have been increased, during such time." But as the disability continues only during the time for which he was elected, this provision is not calculated to produce much effect.

5. *Quorum.* (d) By a quorum is meant the number necessary to do business. In the houses of Congress, only a majority is required to constitute a quorum; but in our assembly, two-thirds. In either, however, a less number may adjourn from day to day, and may compel the attendance of absent members. Such a provision is indispensable in order to secure the continuance of a session, which can only be effected by adjournments.

(a) See the debate on this subject. Mad. Pap. 1268—70.

(b) See Mad. Pap. 1246—8.

(c) For the debate on this subject, see Mad. Pap. 937—945, 1317—26. An absolute ineligibility to any office, during the period of membership was strongly urged.—Ib. 1481—5.

(d) See the debate, in which a less number than a majority was strongly urged.—Mad. Pap. 1287—90.

6. *Yeas and nays.* (a) By yeas and nays are meant the votes which are to be recorded on the journals of each house. In Congress they are required to be taken only at the request of one-fifth; but in our assembly they may be demanded by any two members. When the yeas and nays are not called for, members may shun responsibility, either by not voting at all, or by having their voices drowned in the mass; and even if their vote be known at the time, it is not recorded for future reference. But when the yeas and nays are called and entered upon the journal, every member must vote, unless excused; and that vote may be scrutinized at any future period; so that there is no way of escaping responsibility. This shows the importance of allowing a small number to call the yeas and nays.

7. *Protest.* (b) Our state constitution contains a further provision allowing any two members to make their protest against any act or resolution, and have it entered upon the journal. But this does not seem calculated to answer any very salutary purpose; and the want of a similar one in the federal constitution, is scarcely a matter of regret.

8. *Compensation.* (c) The federal constitution leaves this matter to Congress: at present it is eight dollars per day for the members of each house, and the same for every twenty miles of travel, going and returning. The experiment was made of a fixed compensation, by way of salary; but it proved unpopular, because it did not depend upon the amount of service rendered. In the states the compensation is also *per diem*, but generally much less than for members of Congress. The difference indeed is greater than there would seem to be reason for. In both cases, the compensation is paid out of the respective treasuries, and not by the particular districts.

§ 35. *Separate powers and duties of each house.* There are certain separate powers and duties of each house, without the concurrence of the other, which next require notice.

1. *The election of officers.* With the exception of the federal senate, of which the vice president of the United States is *ex officio* president, each house elects its own officers; namely, a presiding officer, usually denominated speaker; a recording officer, or clerk; an executive officer, called sergeant-at-arms, and a door-keeper.

2. *The rules of proceeding.* These are made by each house,

(a) See the debate, Mad. Pap. 1291-4. Some thought the yeas and nays ought never to be entered, because the reasons of the vote would not appear upon the journal.

(b) This question was discussed in the federal convention, and negatived by a vote of 3 to 8. Mad. Pap. 1292.

(c) It was proposed in the convention that the compensation should be regulated by the price of wheat. Some were in favor of no compensation; some, that it should be regulated and paid by the states; some, that it should be fixed by the constitution. Mad. Pap. 849, 854, 931, 969. It was finally agreed, 9 to 2, that the compensation should be ascertained by law, and paid out of the national treasury. Ib. 1326-30.

and are nearly the same for all deliberative bodies; but they are too numerous to be described. You will find them, with comments, in Jefferson's Manual.

3. *The journal.* (a) Each house is required to keep a journal of its proceedings, and publish it from time to time, except such parts as may seem to require secrecy; in order that the constituents may know what their representatives have done.

4. *The elections, returns, and qualifications* of members. We have already seen that each house is made the exclusive judge of these matters; there being no good reason for requiring the concurrence of the other.

5. *Punishment of members.* Each house may punish its members for "disorderly behavior;" otherwise its business might be utterly prevented; and there is no restriction as to cause or manner of punishment.

6. *Punishment of persons not members.* Our state constitution expressly authorizes each house to punish persons for "contempts committed in its presence," by imprisonment not exceeding twenty-four hours. The federal constitution is silent on this subject; but each house of Congress has been adjudged to possess this power as necessarily inherent; and it has been exercised repeatedly without the restriction specified in our constitution, which takes away half its value. As to what amounts to a contempt, each house judges for itself.

7. *Expulsion of members.* (b) With the concurrence of two thirds, each house may expel a member. Our state constitution provides, that a member "shall not be twice expelled for the same cause." In other words, if his constituents are satisfied to send him back, the house must be content to receive him. Perhaps this is right; but the houses of Congress are not thus restricted. The propriety of this power of expulsion will be felt the more strongly, if we reflect that the power of impeachment does not reach to members of the legislature. Expulsion is therefore the only means of removing an unworthy member.

8. *Adjournments.* (c) Each house can of course adjourn from day to day, without consulting the other. But as the general business of legislation requires the concurrence of both, to prevent one house from defeating or interrupting this general business, it is provided that neither house of Congress, without the consent of the other, can "adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting." It is the same with our assembly, except that the time is two days.

(a) See the original debate. Mad. Pap. 1293-4; also the debate on expunging the resolution censuring President Jackson.

(b) There was no doubt in the convention as to the necessity of this power. The only question was, whether it should be exercised by a bare majority, or a greater number. Mad. Pap. 1291.

(c) See the debate on this subject, Mad. Pap. 1294-6.

Both constitutions further provide, that "in case of disagreement between the two houses with respect to the time of adjournment," the executive may adjourn them "to such time as he shall think proper." This must refer to the time of final adjournment at the end of the session. And our constitution adds, what is implied in the other, that the executive shall not adjourn to a period beyond the annual time of meeting.

§ 36. *Forms of business.* (a) I come now to the *enactment of laws*, commonly called *acts* or *statutes*, which forms the chief business of legislative bodies. The course of proceeding is nearly the same in all legislatures, and I shall give a brief outline of it. Every act in its incipient stage is denominated a *bill*. In general, all bills may originate indifferently in either house. But by the federal constitution, as we have seen, *revenue bills* must originate in the house of representatives, as the branch more immediately representing the people. This exception was borrowed from England, where the house of lords, representing the landed aristocracy, are allowed neither to originate nor amend revenue bills, but simply to pass or reject them. The object is to secure the people at large against oppressive taxation, through the influence of the peers. It is evident that we have not the same reason for placing this check upon our republican senate; and accordingly our senate may amend but not originate revenue bills. (b) In Ohio there is not even this restriction; nor has experience shown the want of it. Bills may be introduced by individual members, on leave of the house; or by the report of a committee. They are required to be read three times in each house; and this must be on three different days, unless, in a case of emergency, three fourths of the house agree to dispense with the rule. The *first reading* is for information only; and if there be any opposition, the question is upon the rejection of the bill. If not opposed or rejected, it passes of course to a *second reading*; and the question is then upon its *commitment* or *engrossment*. If committed, it is either to a standing or select committee consisting of a few, or to a general committee of the whole house. Bills of great importance are usually discussed in committee of the whole, because greater freedom of debate is there allowed, than when the same persons are sitting as a house. After discussion in committee, the bill is reported back to the house, with or without *amendment*. If with amendments, these are acted upon in the house, and others may there be offered. When the bill has in this way become sufficiently matured, the question is upon its engrossment for a *third reading*; by which is meant the copying of it in a fair large

(a) See 1 Blackstone, 181; 1 Kent, 238; 2 Story Const. 359; Jefferson's Manual.

(b) This matter of revenue bills was very much debated in the convention, the large states insisting upon it as a part of the compromise between them and the small states. Mad. Pap. 856, 1016-24, 1045, 1260, 1305-16. The clause was finally adopted by a vote of 9 to 2. Ib. 1531.

hand. After engrossment, amendments are rarely offered. A clause is, however, sometimes added by way of *ryder*. This is the stage where opposition is usually made. After the third reading, the question is upon its final passage. If it pass, it is signed by the presiding officer, and transmitted to the other house, where it goes through a similar routine. If amendments be there made, it is sent back for *concurrence*; and in case of disagreement, committees of conference are appointed. When it has thus passed both houses, it is delivered to a joint committee for *enrolment*, who see that it is correctly copied. It is then signed by the presiding officers of the two houses. And in Ohio, the process ends here; for our governor has not, as in several of the states, a *veto power*. It only remains, therefore, to deposit the enrolled law, thus authenticated, among the state archives, in the custody of the secretary.

Veto power. (a) But the acts of Congress must pass another ordeal before their consummation; and that is the scrutiny of the president. In England, the king has an absolute negative upon the acts of parliament; but the negative of the president is qualified. The bill is sent to him for approval. If he approves it, he signs it. If not, he sends it back to the house where it originated, with his objections, which are entered upon its journal. The bill is then reconsidered; and if it still pass by two thirds of both houses, it becomes a law, notwithstanding the presidential veto. The time given to the president for consideration is ten days, within which he must return the bill, unless Congress prevent him by adjournment; otherwise it becomes a law without his signature. Unfortunately, the practice is to put off important bills until within ten days of the close of the session; and thus put it in the power of the president to give them an indirect veto by mere silence. The veto power thus qualified, extends "to every order, resolution, or vote," to which the concurrence of the two houses is necessary. And although the constitution does not indicate the proper occasions for its exercise, yet as one man thereby sets his individual opinion against a majority of both houses of Congress, it was manifestly intended only for cases of emergency. The better opinion is, that it can be properly exercised only on two occasions; *first*, when the bill, either from oversight in framing it, or from

(a) The first proposition in the convention, was for a council of revision, to consist of the executive and judiciary, which was given up without a vote. Next, an absolute veto, which was unanimously negatived. Next, a power of suspending laws, which shared the same fate. The qualified veto, as it now stands, was then agreed upon by a vote of 8 to 2. *Mad. Pap.* 783—791. A subsequent motion to associate the judiciary, was lost by a vote of 3 to 8—*ib.* 809—12. Still another motion to the same effect was debated, and negatived, 3 to 4, and the present qualified veto agreed to unanimously—*ib.* 1161—71. On a subsequent day, the association of the judiciary was negatived, 3 to 8, and three fourths, instead of two thirds, required to pass a law notwithstanding the executive disapprobation—*ib.* 1332—7. By a subsequent vote of 6 to 4, two thirds was again reinstated—*ib.* 1562—5.

some contingency not known at the time of its passage through Congress, has become manifestly improper to be made a law, at the time of its presentation to the president; or, *secondly*, when such an exercise of power is necessary to shield the executive department against encroachment by the legislature. Being anti-republican in its character, it ought not to be exercised upon questions of mere policy, about which fair minds may differ; for this, as has been well remarked, would be converting the extreme medicine of the constitution into its daily bread.

§ 37. *Presentment and trial of impeachments.* (a) This is a kind of judicial proceeding, and forms an exception to the general business of legislative bodies. Impeachment is the name given to that course of proceedings, by which "*civil officers*" are tried and punished for official misconduct. Civil officers include all public functionaries, except military and naval officers, and members of the legislature; the former of whom are punished by a court martial, and the latter in the manner before described. The causes of impeachment, as stated in the federal constitution, are "treason, bribery, or other high crimes and misdemeanors;" and as stated in our state constitution, "any misdemeanor in office." The meaning is probably the same in both; and comprehends any violation of official duty, whether criminal or not. The mode of proceeding, which is borrowed from the British Parliament, is also the same under both constitutions. The impeachment or charge is presented by the house of representatives, who thus discharge a function similar to that of a grand jury. It is then tried by the senate, sitting under oath; of whom two thirds must concur to produce a conviction. In England, the judgment may include banishment, and even death. But here, it can extend only to removal from office, and future disqualification. If, however, the offence be criminal, the party may be afterwards tried and punished by the due course of law. In case the president should be impeached, the chief justice of the United States is to preside. The reason will be obvious, if we remember that the vice president, who usually presides, would become president, if the impeachment should be sustained; and would not therefore be in a situation to preside impartially. This liability to impeachment is, in theory, one of our strong safeguards for official integrity. In practice, however, it has not yet resulted in the conviction of either a federal officer, or an officer of this state, though the experiment has been several times made. (b)

This terminates the view I proposed to take of the legislative department of the federal and state governments. The federal

(a) The convention at first resolved, that impeachments should be tried by the judiciary. Mad. Pap. 861, 1137. When the trial was given to the senate, it was proposed to except the case of the president—ib. 1528.

(b) A judge, by the name of Elliot, has recently been removed by impeachment, in Louisiana. 1 West. Law Jour. 380.

senate has indeed two other functions, but they can scarcely be called legislative. One is, *to approve of treaties*, which was described in a preceding lecture. The other is, *to approve of the appointment* of officers by the president, which will be described in the next lecture. I think you cannot have failed to be impressed with the striking similarity there is in the structure of the federal and state legislatures. The principal exceptions relate to the federal senate, whose organization is in many respects peculiar. But it is in consequence of these peculiarities, that it has been expressively denominated the "*sheet anchor*" of the constitution. In no other part of this wonderful instrument, do we find such convincing proof of the profound wisdom of its framers. They intended that the senate should be the balance of the federal system, and they have made it so. The house of representatives, being constructed to represent more directly the present feelings of the people, must necessarily represent their changing passions also. The president, whose very unity gives him strength, and who is intrusted with the vast powers to be described hereafter, without some very efficient check, would be more than a match for the other departments. But the senate, by a term of service three times as long as that of the representatives, and half as long again as that of the president; by the necessity of their concurrence in the acts of the one, and by the supervision they exercise over the most important acts of the other, are thereby enabled to constitute precisely the check, which both require.

LECTURE VII.

EXECUTIVE DEPARTMENT. (a)

§ 38. *Unity and duration of the office.* In this lecture I shall give an account of the executive department of the federal and state government. The organization of this department was attended with more difficulty and contrariety of opinion, than any

(a) The history of the proceedings of the convention, with respect to this department, is not a little remarkable. The first resolution was, that a national executive be instituted, on which all were agreed. Mad. Pap. 764. It was next resolved, 5 to 4, that the term be seven years—ib. 767. A proposition to elect by electors, chosen by the people in districts, was negatived by a vote of 2 to 8, and election by Congress was carried by a vote of 8 to 2—ib. 770. A proposition by Dr. Franklin, that there should be no compensation, did not pass to a vote—ib. 770-6. A proposition that the executive be removable by Congress, at the request of a majority of the states, was negatived, 1 to 10; that he should be ineligible a second time, carried, 7 to 2; and that he should be removable by impeachment, carried unanimously—ib. 779. A proposition that the executive should consist of a single person, was carried, 7 to 3—ib. 783. The propositions for an absolute veto, and for a power to suspend laws, were each unani-

other part of our system. The general maxim is, that the exercise of delegated power should always require the concurrence of more minds than one. Yet a calm and thorough discussion both of abstract principles and the lessons of history, suggested a departure from this maxim, in constructing the executive department. The regular functions of this department, being chiefly ministerial, do not require the exercise of deliberation and discretion, to the same extent as those of the other departments. On the contrary, they require a promptness, decision, and energy of action, which could seldom result from the concurrence of several minds; and can only be found in perfection, when flowing from

mously negatived, and the present qualified veto agreed to, 8 to 2—ib. 790-1. A proposition to associate the judiciary with the executive, in the exercise of the veto power, was negatived, 3 to 8—ib. 809-12. A proposition that the state executives should elect, was negatived, unanimously—ib. 830. A proposition that the people should elect, was negatived, 1 to 9; another, that the election should be by electors, appointed by the state legislatures was negatived, 2 to 8; and election by Congress, unanimously affirmed—ib. 1124. Ineligibility a second time was stricken out, 6 to 4—ib. 1125. Tenure during good behavior, was negatived, 4 to 6, and seven years affirmed by the same vote—ib. 1129. Election by electors appointed by the state legislatures, was carried, 8 to 2—ib. 1150. A term of six years was adopted, 9 to 1—ib. 1152. A specific apportionment of electors in the first instance, was carried, 3 to 7—ib. 1153. To be removable by impeachment, was carried, 8 to 2; and to receive a fixed compensation from the national treasury, 9 to 1—ib. 1160. A proposition that the judiciary should be associated in the exercise of the veto power, was again negatived, 3 to 4, and the present qualified veto affirmed unanimously—ib. 1161-71. Election by Congress was again reinstated, 7 to 4—ib. 1188-90. Terms of eight, eleven, fifteen, and twenty years, were silently negatived, as was a proposition to elect by electors selected from Congress by lot; and a proposition that no person should serve for more than six in any twelve years, was negatived, 5 to 6—ib. 1191-1207. A term of seven years, and ineligibility a second time, were reinstated, 7 to 3—ib. 1210. In this shape, the provisions relating to the executive, appear in the first draft of a constitution, reported Aug. 6th—ib. 1236-7. A proposition by Mr. Madison, to associate the judiciary in the exercise of the veto power, was again negatived, 3 to 8—ib. 1333. The qualified veto was again affirmed, with a substitution of three fourths, instead of two thirds, 6 to 4—ib. 1337. A proposition for a privy council, to consist of the president of the senate, speaker of the house, chief justice, and the heads of departments, did not pass to a vote—ib. 1398. A proposition to elect by the people, was negatived, 2 to 9—ib. 1418. A proposition that the election should be by joint ballot of Congress, was carried, 7 to 4—ib. 1419. A proposition that each state should have one vote, was negatived, 5 to 6, and that the election should be by electors, chosen by the people in each state, was negatived, 5 to 6—ib. 1420-1. On the 31st of August, the whole subject was referred to a committee of one from each state, who, on the 4th of September, reported substantially the scheme adopted, including for the first time, the idea of a vice president—ib. 1486. This scheme was debated during five days—ib. 1488-1528. A proposition to reinstate the former scheme, was negatived, 2 to 8—ib. 1498. A term of four years was adopted, 10 to 1—ib. 1508. Election by electors, chosen by the people, was carried, 9 to 2—ib. 1508. Election by the house of representatives, in case of failure by the electors, was carried, 7 to 3—ib. 1511. The proposition that the vice president should be president of the senate, was carried, 8 to 2—ib. 1518. The proposition for an executive council, to consist of six persons, appointed by Congress, was negatived, 3 to 8—ib. 1524. The qualified veto of two thirds, instead of three fourths, was reinstated, 6 to 4—ib. 1564. And thus, within five days of the close of the convention, after so many changes, the executive scheme was at last completed. For a general view of this department, see the 13th lecture of Kent, the 36th and 37th chapters of Story's third book, and the 3d-9th chapters of Blackstone's first book.

a single mind. It was accordingly resolved to vest the executive power primarily in a single person; and this is a principle of all the American constitutions. Accordingly by the federal constitution, "the executive power is vested in a *president* of the United States of America;" and by the constitution of Ohio, "the supreme executive power of this state is vested in a *governor*." This word "supreme," inserted in the latter, is implied in the former; since there are many subordinate executive officers, to be described hereafter. But a single executive head is a monarchical feature, and was not assented to without much misgiving. In the federal convention there was a considerable party in favor of a *plural executive*; and when this proposition failed, an effort was made to procure an *executive council*, whose assent should be required to all executive measures. There is manifestly the same objection to this, as to a plural executive; at least the same in kind, if not in degree. Yet such a council exists in several of the states. But the proposition failed in the federal convention, and was not made in Ohio. Accordingly the president, with a few extraordinary exceptions, and our governor in all cases, may discharge the duties assigned them, without the perplexity, delay, or hindrance, which would result from the necessity of consulting with other persons.

And the *unity* of the executive being thus settled, the next question was, as to the *duration of the office*. Some of the most distinguished members of the federal convention were in favor of its continuing *during good behavior*. But republican jealousy treated this proposition with little favor. It was then actually resolved that the term should be *seven years*, but it was afterwards reduced to *four*, which is intermediate between that of the representatives and senators. This term was considered long enough to give stability to the executive administration, and opportunity to complete important measures of policy, and yet not so long as to make accountability too remote. When the term of seven years was contemplated, the president was to be *ineligible a second time*. And it has become a question of grave importance, whether the public welfare does not require a similar provision now, in order to prevent the first term from being taken up with schemes to secure a re-election. This question was indeed discussed in connection with the term of four years, but experience has since imparted new light; and probably the result of such a discussion now, would be different. As to the term of the state executives, there is great diversity. It varies from one to four years. Here it is two years; and the same person cannot be elected for more than three terms in succession.

§ 39. *Election of president and vice president*. The next question was as to the *mode of election*. It was at first resolved in the federal convention, that the president should be chosen *by Congress*. But this resolution was re-considered, because it was thought that

the *sense of the people* could not be sufficiently expressed in such a choice, and also that there would be too much room for cabal and intrigue. Should the choice then be made by the state legislatures? Or by the people directly? Or by *electors* chosen for that express purpose? After much discussion, the latter method was agreed upon, and there is scarcely any part of the federal scheme more deserving of admiration. It avoids the tumult and disorder which might result from an election directly by the people, and yet gives the people, in their choice of electors, an opportunity to express their views upon this single point, without reference to other matters; which would not be the case if the choice were made either by the federal or state legislatures. The number of electors for each state, is the aggregate of its federal senators and representatives, and thus the compromise between the large and small states is carried out, by giving them the same representation in the *electoral colleges* as in Congress. No qualification is prescribed, except that of not being a member of Congress, nor holding any federal office, which exception was necessary to secure the electors against improper influences. For reasons already sufficiently apparent, the mode of choosing electors is left to the determination of each state, and of course there is some diversity, as by the legislature, by the people in districts, and by general ticket. Congress has power to determine the day on which the electors shall be chosen, and the day on which they shall give their votes; and the latter is required to be the same in all the states, in order to prevent intrigue and corruption. By the act of 1792, Congress fixed the day for giving the electoral votes, on the first Wednesday in December, and required the electors to be chosen within thirty-four days preceding, but did not specify the exact day. The states, therefore, have been allowed to select different days. In Ohio, it is the fifth Friday preceding the day specified. Thus far, the provisions of the constitution remain as they were originally. But the subsequent proceedings have been considerably modified by the twelfth amendment, which was made in 1804. I shall first describe the present regulations, and then explain the points wherein they differ from the former.

On the day appointed, the electors meet in their respective states, and vote by distinct ballots, for president and vice president, one of whom shall not be an inhabitant of the same state with themselves. A list of the votes, duly authenticated, and addressed to the president of the senate, is transmitted to the seat of government, in the manner pointed out by the act of 1792. The votes are opened and counted in the presence of both houses of Congress. A majority of all the electoral votes is necessary to a choice, both of president and vice president. It therefore became necessary to provide for the very probable contingency of a want of a majority. In this event, the election of president devolves upon the house of representatives, voting by states, and that of

vice president, upon the senate, voting individually. In each case, two thirds are required for a quorum, and a majority of the whole for a choice. The house must select from the three highest candidates on the list, and the senate from the two highest. If the house fail to elect a president before the ensuing fourth of March, the vice president is to act as president. Such is the substance of the twelfth amendment.

The original method differed in these particulars. *First*, the electors voted for two candidates in one ballot, without specifying the office for which each was intended. *Secondly*, the highest of all the candidates, if he had a majority, was president; and the next highest vice president. *Thirdly*, if two candidates had a majority, and were equal, the house chose between them; but if no candidate had a majority, the house chose from the five highest. *Fourthly*, there could be no vice president, until the president was chosen; and the senate only had the choice, when the two next candidates had an equal number of votes. *Fifthly*, there was no provision made in case of failure to elect a president before the fourth of March; and of course, so far as the executive is concerned, there must have been an interregnum. This calamity had well nigh happened in 1801, when the contest was between Jefferson and Burr. The house balloted thirty-six times, and it is believed that nothing but the fear of such a crisis unprovided for, occasioned a final choice. This bitter contest is supposed to have caused the twelfth amendment. It will be observed that the present method greatly diminishes the dignity of the second office, since it is no longer placed in competition with the first. Whether this is compensated by other advantages, is a matter of opinion. There is still a case unprovided for, and that is, the failure to elect either a president or vice president within the period prescribed. By the act of 1792, Congress has indeed provided for a new election in this event; but there is some doubt whether Congress has constitutional power to make such a provision. Another difficulty may arise in case of doubt about the authenticity of the electoral returns; and still another, in case two out of the four highest candidates for president should have an equal number of votes. These contingencies, though by no means improbable, have not as yet been provided for.

If now we turn to the mode of electing the state executives, we find almost an entire contrast. In some few instances the governor is elected by the legislature, but generally directly by the people. In Ohio, the time, place, and manner are the same as for members of the legislature. The returns are made to the speaker of the senate, and counted in the presence of both houses. A plurality only is required for a choice, and in case of a tie, the choice is made by a majority of both houses on joint ballot. Contested elections are decided in like manner. If a case can be

supposed, in which the assembly would fail ultimately to make the election devolving on them, that case is unprovided for.

The original scheme of the convention did not embrace such an officer as the *vice president*. (a) But in the course of their deliberations, two reasons suggested themselves, for creating this office. The first was, to provide a presiding officer for the senate, without depriving any state of its equal vote, by taking him from that body. The second was, to provide a suitable person to supply a vacancy in the office of president. In presiding over the senate, the vice president only gives a casting vote in case of a tie, and never joins in their deliberations; because otherwise one of the states would have an advantage over the rest. This is the only duty annexed to the office, until by removal, death, inability, resignation, or failure to elect, the office of president becomes vacant. Then this office devolves on the vice president, and the senate elect a *president pro tempore*. If from either of these causes, except a failure to elect, the office of vice president also becomes vacant, Congress has power to provide what officer shall act as president; and by the act of 1792, Congress has designated, first the president *pro tempore* of the senate, and next the speaker of the house of representatives. No further contingency has been provided for. The arrangement in some of the states is similar to this, in providing a *lieutenant governor*, to fill the office of governor if need be. But in Ohio no such office has been created; and in case of vacancy the constitution designates, first the speaker of the senate, and next the speaker of the house of representatives, to officiate as governor.

§ 40. *Qualifications, compensation, oath.* The qualifications for president and vice president are the same. 1. The candidate must be a "natural born citizen;" in order to leave no room for foreign influence or interference. An exception, however, was made in favor of "citizens of the United States, at the time of the adoption of the constitution," out of respect to those distinguished patriots from foreign lands, who had taken part in our revolution. 2. He must be at least thirty-five years of age; by which time, his judgment is presumed to be matured, and his qualifications known. 3. He must have been "fourteen years a resident within the United States," so that he may be familiar with our established policy, and his countrymen acquainted with him. But "resident" is not here understood to mean that he should not have been absent on public business, or even temporarily absent on a journey. It only means that his permanent domicile must have been in the United States. The qualifications for governor of this state are, that he shall be thirty years of age; for twelve years a citizen of the United States; and for four years a resident

(a) This was first proposed near the close of the convention. Mad. Pap. 1496, 1516.

within the state. And no member of Congress or person holding any federal or state office, is eligible.

Compensation. (a) The compensation of the president is regulated with a view to his independence and integrity. The constitution could not with prudence fix its amount absolutely, because circumstances might require it to be changed. But while it is left to Congress to regulate the amount, the constitution provides, that being once fixed, it shall neither be *increased* nor *diminished* during that presidential term; and that the president shall not, during that period, receive any other emolument from the United States, or from either of the states. He is thus placed above pecuniary influence, operating either upon his hopes or fears. There is no avenue through which to address his venality. He can neither be allured nor intimidated, by pecuniary motives, to swerve from the line of his duty. By the act of 1789, Congress fixed the salary of the president at twenty-five thousand dollars, and that of the vice president at five thousand dollars; and they have not since been altered.

Oath. We have already seen, that all federal and state functionaries are required to take an oath "to support" the federal constitution, the form of which is prescribed by the act of 1789. This provision would include the president. But for some reason not apparent, there is a special oath prescribed for him in the constitution itself, by which he engages "to preserve, protect, and defend" the federal constitution. What difference there is between swearing to support the constitution, and swearing to preserve, protect, and defend it, cannot be readily perceived; and probably none was intended; although some executive parasites, have affected to find, in this oath, something to indicate that the constitution intended to make the president its peculiar and paramount guardian. The state constitution requires all state functionaries to take an oath "to support" both constitutions, but provides no special oath for the governor. It also requires "an oath of office" to be taken before entering on duty; that is, an oath that the office shall be faithfully administered.

§ 41. *Powers and duties of the president.* I shall consider this subject under several distinct heads.

Military power. The president is "commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States." The governor is commander-in-chief of the army and navy of the state in time of war only, since they cannot exist in time of peace; and of the militia of the state, when not under the

(a) When the question of compensating the president first came up in the convention, Dr. Franklin was in favor of his having nothing but his expenses, and presented an elaborate written argument to that effect. *Mad. Pap.* 770. It was next resolved that he should receive a fixed compensation out of the national treasury—*ib.* 860, 1160

control of the president, by the above provision. The propriety of committing the ultimate command of the armed force of the country or state to a single hand, seems hardly to admit of dispute; and the very nature of the power demonstrates it to be peculiarly an executive power. It is not intended that the president or governor should necessarily take the field in person on all occasions; for this might interfere with other duties; but they are respectively made the sources, whence orders are to emanate. Much apprehension was at first entertained, lest this *power of the sword* might make the executive too strong for a free government. But when we come to consider the power which the legislature exercises with respect to the army, navy, and militia, we shall find that abundant precaution has been taken to prevent the executive from abusing his share of power.

Consulting power. (a) The president and governor are authorized to "require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." This provision seems to be a redundancy; for the power in question would result necessarily from the relation established between the chief executive officer, and those who are placed in subordination to him. Some of the state constitutions further authorize the executive to take the opinion of *the judges*, on questions of law. But this seems unnecessary, because there is a special law officer appointed for this among other purposes; and improper, because the judges may be afterwards called upon to try the very questions thus prejudged.

Pardoning power. (b) The president and governor are authorized in their respective spheres, "to grant reprieves and pardons for offences, except in cases of impeachment." There can be no doubt [that the pardoning power ought to exist somewhere; because criminal justice can never be administered so perfectly, that every convict shall deserve to suffer the full and exact sentence which the law pronounces. Where then shall this benign attribute of government be lodged? If there were no other objection to the legislature, it is not always in session; and the case has but just come from the hands of the judiciary. The executive, therefore, seems to be the only suitable depository. No doubt this power should be exercised with great circumspection, and may be exercised indiscreetly. But the executive is as likely to act judiciously as any other functionary. And should the power be sometimes abused, we have the satisfaction of knowing that the error must be on the side of mercy. In general the pardoning power may be exercised before conviction, as well as after. But the constitution of Ohio expressly confines it to

(a) See Mad. Pap. 1522-4. Instead of this, an executive council was warmly insisted upon, but negatived by a vote of 3 to 8.

(b) See Mad. Pap. 1433, 1587.

cases *after conviction*; and perhaps it is well that the case should first be judicially investigated, in order that the exact truth may be known. In England this power may be exercised in cases of impeachment; but these cases are properly excepted here, because the judgment in such cases is confined to removal from office, and future disqualification; and cannot, as in England, involve a criminal punishment.

The treaty-making power. (a) This, we have seen, is vested in the president, with the concurrence of two thirds of the senate; and the states are prohibited from making treaties. But enough has already been said upon this topic.

Appointing power. (b) The president is empowered "to nominate, and by and with the advice and consent of the senate, appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which may be established by law: but Congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments." Also, "to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." Also, "to commission all the officers of the United States." In these provisions the following points are worthy of notice.

1. The nomination of officers is given to the president, because one person, in his situation, can select better than many. But a negative is given to the senate, to protect this dangerous power against abuse. And it rests with Congress to determine whether there shall be any "inferior officers," whose appointment shall not require the consent of the senate. Congress has hitherto authorized "the courts of law" to appoint no officers but their clerk and reporter; but has vested the appointment of a vast number of inferior officers, probably fifty thousand, "in the president alone," and "in the heads of departments;" and the enormous patronage thus placed at the disposal of the executive, without any immediate check against abuse, may be justly regarded as the most serious cause of apprehension existing in our political system. If corruption shall ever destroy the glorious fabric, it will enter through this avenue.

2. The executive can *create* no office, for the purpose of filling it, because the constitution requires it to be "established by law." And as to the "filling of vacancies," the very term "vacancy," implies a pre-existing office to be without an incumbent. Moreover, it must have occurred "during" the recess of the senate. And the word "happen," indicates some casualty, as death, resignation, or the like. It would seem, therefore, that the president

(a) See ante § 17.

(b) See Mad. Pap. 1422, 1432, 1519; *Marbury v. Madison*, 1 Cranch, 137.

cannot create a vacancy for the purpose of filling it, any more than an office; but on this point there is a difference of opinion.

3. When the senate have consented to an appointment, it is held to be not so far consummated, but that the president may refuse a commission; for he still has room to change his mind. But when the commission has actually been signed by him, and delivered to his secretary, the appointment is final and complete; and the secretary has no right to withhold the great seal, even by the order of the president, except where the officer is removable at his pleasure. (a)

4. The power of *removal* is no where expressly given to the president; and yet as none but judicial officers hold their offices during good behavior, this power must reside some where. The general opinion has been, that it is necessarily implied in the power of appointment, where the contrary is not expressed. But in 1789, it became a question, whether the consent of the senate was necessary to the removal of those officers whose appointment required their consent. After a very elaborate discussion in Congress, a small majority affirmed the power of removal to be in the president alone, and this construction, though in the opinion of many erroneous, has ever since been adopted in practice.

5. An appointing power similar to that of the president, is conferred upon several of the governors. But the constitution of Ohio only authorizes our governor, to fill vacancies during the recess of the assembly, in those offices to which the assembly have the appointment; and to commission officers generally. There is indeed a clause authorizing the assembly to confer on the governor the power of appointing officers not otherwise provided for; but, with the single exception of *notaries public*, other provision has always been made. So that, in general terms, our governor may be said to possess no appointing power, and no patronage whatsoever.

Power as to legislation. We have already considered the *veto power* (b) of the president, which constitutes his chief agency in legislation; and which our governor does not possess. But both the president and governor are connected with the legislative department by other provisions. They are required from time to time, to communicate information respecting the general operations of government, and to recommend for consideration such measures as they shall deem expedient. This is a highly appropriate and beneficial provision. The executive is placed on an eminence whence he has opportunities of observing the errors and deficiencies in legislation, which are not possessed by the members of the legislature. The first two presidents, after the manner of the English king, met Congress in person, and delivered a speech

(a) See *Marbury v. Madison*, 1 Cranch, 137.

(b) See ante § 36.

orally, to which the two houses subsequently responded. But now the custom, both of the federal and state executives, is to send a written message, exhibiting the operations of the government during the past year, and communicating facts and suggestions, to aid in legislation. The only remaining provisions under this head, are those which authorize the president and governor to convene the respective legislatures on extraordinary occasions; and in case of disagreement between the two houses, respecting the time of adjournment, to adjourn them.

Power as to foreign relations. In addition to the agency of the president in making treaties, and appointing and instructing our foreign ministers, it is his duty "to receive ambassadors and other public ministers" from foreign nations. No representative from a foreign power can act in that capacity here, until his credentials have been examined, and he has been "*received*," or accredited by the president. And this function sometimes becomes one of exceeding delicacy and responsibility; for the refusal to receive a foreign minister is often deemed a justifiable cause of war. In cases, also, where, by civil commotion, a nation is divided into factions, each claiming the sovereign power, the reception of an ambassador from one, would indirectly amount to a decision against the other. But however important the consequences of a reception or refusal, the question is left solely to the discretion of the president. In fact, with the single exception of the check which the senate hold with respect to treaties, our foreign relations are under the exclusive control of the president.

Power of general supervision. It is a duty enjoined upon the federal and state executives, "to see that the laws be faithfully executed." It would be dangerous, however, to treat this clause, as conferring any specific power, which they would not otherwise possess. It is rather to be regarded as a comprehensive description of the duty of the executive, to watch with vigilance over all the public interests.

§ 42. *Subordinate federal officers.* In order to complete our view of the executive department, it remains that we take a brief notice of the subordinate executive officers, first of the federal, and then of the state government. To aid the federal executive in the discharge of his various and responsible duties, Congress has created five principal departments; namely, the *state, treasury, war, navy, and post-office* departments. The heads of the first four are styled *secretaries*; and the last, *post-master general*. By custom, these five officers, together with the *attorney general*, constitute the president's *cabinet*. They are appointed by the president, with the consent of the senate, and are removable at pleasure. With some few exceptions, each has the appointment of all the numerous subordinate officers, clerks, and other agents employed in his department. But the scheme is too extensive and

complicated to admit of a minute description. I can barely refer to the general duties intrusted to each of the departments.

State department. This was created in 1789. The chief duties of the secretary of state, are as follows. 1. To keep the custody of the originals of all treaties, laws, and other public documents; and furnish authentic copies thereof, when duly required. 2. To superintend the publication and distribution of the laws; to procure copies of all state laws; and to prepare and publish biennially a register of the names, residence, and compensation of all the civil, military, and naval officers of every degree; and of the names and condition of all public vessels. 3. To keep the great seal of the United States, and affix it, with his signature, to all commissions or other documents requiring it. 4. To superintend the *patent office*; which is attached to this department, and will be referred to hereafter. 5. To conduct the foreign relations of the government. These relations are either political or commercial. Political relations with foreign nations are conducted through the agency of *ambassadors* or other public ministers; and commercial relations are conducted through the agency of *consuls*, who are stationed in all the principal ports and cities of the world. These foreign officers are all appointed by the president with the consent of the senate; but receive their instructions through the secretary of state, with whom they hold their correspondence. They are all recognized by the law of nations, and enjoy peculiar privileges and immunities wherever civilization extends. In like manner, the agents of foreign governments stationed here, conduct their intercourse through the secretary of state. So that, in a word, the whole *diplomacy* of the country is conducted by him, under the direction of the president.

Treasury department. (a) This was also created in 1789. Its general duty is to manage the *fiscal operations* of the government. The secretary has cognizance of all matters connected with the *national revenue*; he has the general supervision of the *custom houses* and their officers; and the *general land office*, as we have already seen, is a branch of his department. We shall see, hereafter, that no money can be drawn from the treasury until Congress has made an appropriation for that purpose. But our security against the waste or improper use of the public money would be still imperfect, were it not for the admirable organization of this department; which is so framed as to establish the strictest accountability, and make the different officers act as checks upon each other. I have room barely to indicate its character. 1. There are *auditors*, whose business it is to examine all accounts with the treasury, and certify the balances; and for this purpose, certain classes of accounts are assigned to each auditor. 2. There are

(a) It was proposed in the convention, that Congress should elect a treasurer by joint ballot, but this was negatived by a vote of 8 to 3. Mad. Pap. 1574-5.

comptrollers, whose duty it is to revise the accounts certified by the different auditors, make a record of the balances, and certify them to the *register*. 3. It is the duty of the *register* to preserve these accounts thus certified to him; and also to keep an accurate account of all the receipts and expenditures of the government. 4. It is the duty of the *treasurer* to receive and keep the public money, until duly ordered to disburse it; which can only be upon warrants drawn by the secretary, countersigned by the proper comptroller and auditor, and recorded by the register. 5. By the act of 1830, the office of *solicitor* of the treasury was created, whose duty it is to superintend the litigation connected with this department. It would seem as if, under this arrangement, it would be impossible for embezzlement or speculation to extend far without detection. It is worthy of remark, that the secretary of the treasury is the only one of the heads of department, who reports his proceedings directly to Congress; and to him they look for suggestions and estimates, on which to base their appropriations.

War department. This department was also created in 1789. The secretary has the general superintendence of *military affairs*. But as in this country the concerns of the army would not be sufficient of themselves to occupy a department, our *Indian relations*, are made a branch of this department.

Navy department. This was not made a distinct department until 1798. It is much less extensive in its operations than either of the preceding. The secretary has the general superintendence of *naval affairs*, but no extra duties.

Post office department. This department, though coeval with the government, derived its present organization chiefly from the act of 1810. Its patronage and influence are far more extensive than those of either of the other departments; as will be obvious from reflecting upon the immense number of post-masters and mail-contractors, required in a country like ours. And there is no department of the government whose instrumentality in promoting the general happiness, is more directly felt.

§ 43. *Subordinate state officers.* It now only remains that I describe the subordinate executive officers of this state. These may be divided into three classes; namely, *state officers*, *county officers*, and *township officers*. Of these in their order; and first, *state officers*. These are a *secretary*, *treasurer*, and *auditor*. These officers are all elected by joint ballot of the assembly, and hold their offices for three years. The *secretary* is keeper of the great seal of the state, and sealer of weights and measures. He has the custody of the public archives, and is the recording officer of the governor. He superintends the publication and distribution of the laws; and countersigns, seals and registers all commissions or other documents requiring the great seal. The *auditor and treasurer* perform the duties suggested by their titles. The auditor examines and adjusts all accounts with the

state, and issues orders for the amount upon the treasurer, who can pay out no money without such order. Each keeps a record of all orders issued and presented, and the originals, when paid, are filed as vouchers. It is further the duty of the state auditor to furnish the county auditors with all necessary forms and instructions relating to the revenue.

County officers. These are, three *commissioners*, an *auditor*, *treasurer*, *assessor*, *recorder*, *surveyor*, *sheriff*, *coroner*, and *prosecuting attorney*; all elected by the people of each county. The county *commissioners* hold their offices for three years; but one is elected each year. They may be regarded as the county legislators or managers. They have the care of the county property; of idiots and lunatics; of roads; and of paupers. They establish and alter townships and roads, and fix the amount of county taxes. But an appeal always lies from them to the court of common pleas. The *auditor* and *treasurer* are elected biennially; and their duties are so similar to those of the state auditor and treasurer, as to require no description. The *assessor* is also elected biennially. His duty is to assess the value of all taxable property, and report to the auditor; but an appeal lies from him to a *board of equalization*, composed of the commissioners, auditor, and assessor. The *recorder* is elected biennially; and his duty is to record all instruments for the conveyance or incumbrance of real property within the county; and make authenticated copies thereof when required. The *surveyor* is elected triennially; and his duty is to make and record surveys when required, and take testimony in cases of disputed boundaries. The *sheriff* is elected biennially, but cannot hold the office more than four years out of six. His duties are exceedingly various. He is the executive officer of the courts; a conservator of the peace; and keeper of the jail. He also has to notify all county elections, and make returns thereof. The *coroner* is elected biennially. During a vacancy in the office of sheriff, or when the sheriff is interested, the coroner performs his duties; but his peculiar province is to hold inquests over dead bodies, when there is reason to suspect violence, and procure the verdict of a jury upon the cause of the death.

Township officers. These are three *trustees*, a *clerk*, *treasurer*, two *overseers of the poor*, and such number of *constables* as the trustees may direct. These officers are all elected annually by the people of each township. *Township trustees* have nearly the same relation to the townships, that commissioners have to the counties; that is, they have the general supervision of township affairs. The general duties of the other officers are sufficiently indicated by their official designations.

It may be remarked in general, of all the officers before enumerated, that their fidelity is secured in three ways. *First*, by the official oath before described. *Secondly*, by an official bond, when there is any pecuniary responsibility. *Thirdly*, by a

variety of penalties for misbehavior. There is also a general provision that they shall hold their offices until their successors are appointed. This provision saves much difficulty, in case of a failure to elect on the proper day. I have been able barely to allude to their various duties. But enough has been said to indicate the general character of our municipal organization; and this is all I had in view.

LECTURE VIII.

JUDICIAL DEPARTMENT. (a)

§ 44. *Nature of this department.* We have now reached that portion of our inquiries, which is of most immediate interest to the professional student. We are to consider the *organization*

(a) The history of the proceedings of the convention respecting this department, is briefly as follows. It was resolved, without debate, that a national judiciary be established, to consist of one supreme tribunal, and of inferior tribunals. Mad. Pap. 791. A tenure during good behavior, and a fixed compensation, not to be increased nor diminished, were also agreed to without debate—ib. 794. The subject of inferior tribunals was left to Congress, 8 to 2—ib. 800. The appointment of judges by the senate was agreed to unanimously—ib. 855. A proposition, that the executive should appoint, was negatived, 2 to 6—ib. 1134. A proposition, that the executive should appoint with consent of the senate, was lost by a tie vote—ib. 1135. The declaration that the compensation should not be increased, was stricken out, 6 to 2—ib. 1136. It was at first proposed that the jurisdiction should extend to cases of revenue, impeachment, and questions involving the national peace and harmony—ib. 860. Cases of impeachment were afterwards stricken out, and cases arising under the national laws added—ib. 1137. On a subsequent debate, appointment by the president and senate was negatived, 3 to 6, and appointment by the senate affirmed by the same vote—ib. 1171-5. Such was the condition of this department, as reported in the first plan of a constitution, except that there was a more specific enumeration of the cases of jurisdiction—ib. 1238-9. A proposition to make the judges removable by the executive on the application of Congress, received but one vote—ib. 1437. The last proposition was, that the judges should be appointed by the president and senate, which was adopted unanimously—ib. 1520. For further information respecting the judicial department, see 3 Story Const. chap. 38; 1 Kent lec. 14-18; Sergeant on Constitutional Law; Duponceau on Federal Jurisdiction; Conkling on the Jurisdiction and Practice of the U. S. Courts; 3 Blackstone, ch. 3-6; Kitchen on Courts; United States v. Ravara, 2 Dall. 297; Chisholm v. Georgia, 2 Dall. 419; Clarke v. Harwood, 3 Dall. 342; Wiscart v. Dauchy, 3 Dall. 321; Fowler v. Lindsey, 3 Dall. 411; Turner v. Bank of North America, 4 Dall. 8; New York v. Connecticut, 4 Dall. 1; Marbury v. Madison, 1 Cranch, 137; Clarke v. Bazadone, 1 Cranch, 212; United States v. Moore, 3 Cranch, 159; Owings v. Norwood, 5 Cranch, 344; Durosseau v. United States, 6 Cranch, 307; McIntyre v. Wood, 7 Cranch, 504; Fairfax v. Hunter, 7 Cranch, 603; Martin v. Hunter, 1 Wheat. 304; Miller v. Nicholls, 4 Wheat. 311; Cohens v. Virginia, 6 Wheat. 264; United States v. Ortega, 11 Wheat. 467; Williams v. Norris, 12 Wheat. 117; Montgomery v. Hernandez, 12 Wheat. 129. Also, by way of comparison, the 3d, 4th, 5th, and 6th chapters of Blackstone's third book.

and *jurisdiction* of the judicial department of the federal and state government. To this department the people have committed the high functions of interpreting and applying the laws of the land, and of declaring them void, when they contravene the provisions of the constitution. To this department, thus made to be pre-eminently the guardian of the laws, we resort in all cases of doubt or controversy, as the final arbiter of our rights; and our lives, liberty and property hang upon its decisions. It has been said that judges exercise no will of their own; but merely expound the legislative will. This is theoretically true; and if our laws were all legislative acts, it might be true in point of fact. But in the present state of law, as before described, who can doubt that they exercise a high and vast discretion? Who, that has ever observed the course, variety, and amount of litigation, even in the best regulated community, will hesitate to say, that judges exert a more immediate influence upon individual happiness, than any other public functionaries? Legislators, indeed, erect the temples of justice, but judges preside therein. The executive sees to the execution of the laws, when there is no doubt or difficulty; but these cases of doubt and difficulty are the very occasions when judicial interposition is required. What is the law applying to a given case? Is it constitutional? Has it been violated? What are the consequences? These are the questions which judges are ordained to answer, with reference to all the interests which men hold dear on earth, whenever these interests become the subject of controversy; and in making up their decisions, they are less limited by precise and peremptory instructions, than any other public officers, in the discharge of their prescribed duties. No wonder, therefore, that the framers of our government evinced a deep solicitude with respect to the structure of this department. They would have been unequal to their mighty undertaking, if they had not been deeply sensible how much its ultimate success must depend upon a well constituted judiciary. And yet, while this department holds the happiness of individuals so much at its disposal, and may thus become so efficient an instrument of good, it is a gratifying reflection, that no perversion or abuse of its powers can ever make it an equally efficient instrument of evil. It holds neither the purse nor the sword of the community. It dispenses no patronage. It makes no rules but for individual cases. Its chief function is judgment, and that affects only the parties in litigation. If, therefore, it possessed the will, it is utterly destitute of the power to subvert our liberties. The blow which is to destroy them, if it come at all, must come from one of the other departments. The judiciary can do little to promote such a catastrophe, but may do much to avert it.

We have seen that the want of a federal judiciary was one of the glaring defects of the confederation. The framers of the constitution, therefore, with this admonition before them, were

unanimous in the opinion that such a department must be created. No one thought of leaving the interpretation of federal powers entirely to the state tribunals. There were some, however, who thought that it would be sufficient to provide one supreme federal tribunal, as a court of ultimate resort, and leave the rest to the states; but this number was small. The weight of opinion was greatly in favor of providing also for inferior federal courts, and thus forming a complete federal judiciary. Again, there were some in favor of imitating the structure of the English judiciary, as several of the states have done, by making the senate the court of final jurisdiction. But this opinion also yielded to the great maxim, that power, in order to be safe, must be divided among distinct departments. And the constitution accordingly declares, that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish;" and in another place, that "the Congress shall have power to constitute tribunals inferior to the supreme court."^(a) This last provision is, of course, a pleonasm, and the most striking one in the constitution. It may now appear strange that this language of the constitution should ever have been supposed to leave it optional with Congress, to provide for a supreme and inferior courts or not. But this was once a question of much speculation; though it does not appear that Congress has ever regarded the provision otherwise than as strictly imperative. A question of more doubt has been, whether Congress is hereby required to vest the whole judicial power of the United States in the federal courts; or has an option to confer some portions of it upon the state courts. But it has been decided, that all the jurisdiction contemplated by the constitution must be vested in courts constituted by Congress. If the state courts have a concurrent jurisdiction in certain cases, it is because they possessed such jurisdiction originally, and the federal constitution did not take it away. They cannot derive it from any grant of Congress, because the constitution does not authorize Congress to confer it.^(b) The result then is, that there must be one, and only one supreme federal court; that the number and nature of the inferior courts are left to the discretion of Congress; and that among these courts, all federal jurisdiction must be distributed. In this way, has the constitution redeemed the pledge given in its preamble, "to establish justice."

§ 45. *Organization of the federal courts.* The organization of the federal courts, pursuant to the foregoing provisions, is as follows. Besides the *supreme* court, Congress has created two inferior courts, denominated *circuit* and *district* courts. But for

(a) The convention at first resolved that there should be one supreme, and inferior tribunals; but afterwards left the matter of inferior tribunals to Congress. *Mad. Pap.* 791, 800.

(b) *Martin v. Hunter*, 1 *Wheat.* 304.

these three grades of courts, there are but two grades of judges, namely, *supreme* and *district* judges. The supreme court consists of nine supreme judges; namely, one *chief justice*, and eight *associate justices*. This court holds one session, annually, at the seat of government. For the purpose of organizing the inferior courts, the United States are parcelled off into *districts* and *circuits*. Each state forms at least one district, and sometimes more. For each of these districts, there is a district court, consisting of a single district judge, and held at least twice a year. Several of these districts constitute one circuit; for which there is a circuit court, held twice a year, in each district of the circuit, and composed of one supreme judge and the district judge. Thus the circuit court holds an intermediate rank between the supreme and district courts. It was originally doubted, and not without reason, whether the supreme judges could constitutionally sit on the circuits at all; and perhaps it may become expedient to act upon this doubt, and create a distinct set of circuit judges.

§ 46. *Organization of the state courts.* The organization of our state courts is as follows. The judicial power is vested by the constitution, "in one supreme court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the legislature may establish." As yet, the legislature has established no other than those specified; so that our courts correspond in number and rank to the federal courts.

The *supreme court* consists of four judges, who take precedence from the dates of their commissions; or where these are the same, according to age: and the one having precedence of all the others, is styled the *chief judge*. This court is held once a year in each county of the state; and by a singular interpretation, two judges are held to constitute a quorum. This was doubtless right when there were only three judges; but now the necessity arising from the immense labor to be performed, can only justify making one half a quorum. This court is also held once a year at the seat of government, by all the judges sitting as a *court in bank*, for the purpose of deciding such law questions as have been reserved in the different counties.

For the purpose of organizing the *courts of common pleas*, the state is divided into *circuits*; and each court is composed of one *president judge* for each circuit, and three *associate judges* for each county; any three of whom constitute a quorum. This court is held three times a year in each county. The *justices' court* is held, with some special exceptions, by a single justice of the peace, of whom each township has one or more; and there are no stated terms. The justice attends whenever there is occasion; and by our present law, either party, by paying the expense, may have a jury of six.

It will be at once perceived, from this account, that we have too few supreme judges to perform the enormous duty imposed

on them; and that there are too many judges of the courts of common pleas. Why should there be only four judges in the court of last resort for the whole state, when there are more than two hundred of the next inferior grade?

§ 47. *Appointment, tenure, compensation.* The *mode of appointment* of judges is the next subject of inquiry. The federal convention at once resolved that the supreme judges should be appointed by the senate, without the nomination of the president. (a) But as we have already seen, the constitution was ultimately so framed, as to require them to be appointed by the president and senate. Congress has also required the inferior judges to be appointed in the same way. The excellence of this mode of appointment has been sufficiently dwelt upon. But if further illustration were wanted, it might be found in the contrast which our state constitution furnishes. All our judges are elected by joint ballot of both houses of assembly; and our justices of the peace, by the people of each township. That the federal method is preferable, seems hardly to admit of doubt. One man can select better than many; and where there is a negative given to another body of men, there can be little danger of improper appointments. But where the appointment is given even to a legislative assembly, there is too much room for political intrigue, party prejudice, and local partiality, to allow the qualifications of the candidate, to be the sole object of consideration. Besides, with the exception of the supreme judges, who must be presumed to be generally known, it is obvious that only a few of the members can have personal knowledge of the persons to be appointed in the different counties. Still the mode of appointment in Ohio is very far preferable to an election by the people, which prevails in some of the states.

Tenure of office. (b) The *tenure of judicial office* comes next in order. We have seen, that a salutary republican jealousy has limited the legislative and executive functionaries to short and fixed terms of service. But various reasons seemed to justify a departure from this policy, in relation to judicial officers. *First*, no danger is to be apprehended from a long term, because judicial power, from its nature, cannot enslave the people. *Secondly*, a proper discharge of judicial duty requires vast learning and expe-

(a) The first proposition was, that Congress should appoint the judges, which was negatived, by a vote of 9 to 2. Then, that the senate should appoint, which passed unanimously. Dr. Franklin mentioned the Scotch mode of a nomination by the bar, who would be sure to select the best lawyer, to get him out of the way. Mad. Pap. 792, 855. Then, that the executive should appoint them, which was negatived, 2 to 6—ib. 1131-4. Then, that the executive should appoint them with the consent of the senate, which was lost by a tie vote—ib. 1135. A subsequent proposition to the same effect, was debated, and negatived, 3 to 6, and appointment by the senate affirmed, 6 to 3—ib. 1171-5. But ultimately, appointment by the president and senate was carried unanimously—ib. 1520.

(b) There seems to have been no diversity of opinion in the convention upon this subject. Mad. Pap. 794. A proposition that judges should be removable by the president, on the application of Congress, received but one vote—ib. 1436.

rience, which a short term of service would furnish neither an adequate motive nor opportunity for acquiring. And *thirdly*, integrity, firmness, and independence, so indispensable to a well organized judiciary, can only be secured by an independent tenure of office. Accordingly, in imitation of the best governments of Europe, and the best of our state constitutions, the federal constitution declares that "the judges both of the supreme and inferior courts, shall hold their offices during good behavior." The consequence is, that they are removable only by impeachment. They are thus placed beyond the reach of fear or favor, and have nothing to consult but the monitor within. The waves of popular commotion cannot reach them; and they have no occasion to court the good will of the other departments. From the secure elevation on which they are thus placed, all disturbing influences being removed, they are left to the calm and fearless exercise of unbiassed judgments; and there is a life before them in which to perfect themselves for duty. But here, again, our state constitution offers a contrast. Our judges are elected for only seven years, and our justices of the peace for only three. And is it probable, with such a tenure of office, that they will be as independent, or as well qualified, as with the tenure of good behavior? There can be but one answer; and yet, when we look to some of our sister states, we have reason to be thankful that we have not annual elections. There is a provision in some of the state constitutions, making judges removable, on the address of both branches of the legislature. And such a proposition was made with respect to the federal judges, but the convention wisely rejected it. Nor have we any such provision in Ohio.

Compensation. The next topic is the *compensation* of judges. This should be so large as to secure the best abilities; and so regulated as to co-operate with the other provisions, in rendering the judges independent. Accordingly, both the federal and state constitutions provide that the judges "shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." It may, however, be *increased*, since this is not prohibited. (a) This provision wisely proceeds upon the maxim, that the power over one's subsistence, is a power over his will; and that the power to diminish it, is much more efficient to subdue his will, than the power to increase it. Accordingly, the judicial salaries are so regulated, that while they may be prospectively altered from time to time, as circumstances may require; yet no judge can be required to receive a less salary than that with which he went into office.

§ 48. *Subordinate officers of courts.* (b) To complete our

(a) At first, the convention resolved that it should neither be increased nor diminished. Mad. Pap. 794. Afterwards, the prohibition to increase was stricken out, 6 to 2—ib. 1136, 1437.

(b) 1 Kent, 306—309.

view of the organization of courts, it remains that I speak briefly of the subordinate officers. These are, the *recording officer*, the *executive officer*, and the *managers of causes*. Of these, in their order.

Recording officer. This officer is usually styled *clerk*, but sometimes *prothonotary*. His regular duties are, to keep a record of all judicial proceedings; to keep the seal of the court, and affix it to all papers requiring it; and to issue all writs proceeding from the court. The supreme federal court and the district court have the appointment of their respective clerks; and the clerk of the district court is also the clerk of the circuit court for that district. These clerks are appointed for no definite period, and are of course removable at pleasure. Our state courts likewise appoint their respective clerks for each county, who hold their offices for seven years, unless removed for misbehavior. It usually happens that the same person in each county is clerk of both courts, but this is a matter of convenience. The courts of justices of the peace, not being courts of record, and having no seal, require no clerks. The compensation of clerks is derived from fees, and they are under bonds for fidelity.

Executive officer. (a) The *executive officer* is variously styled *marshal*, *sheriff*, or *constable*, according to the court in which he officiates. The executive officer of the federal courts is a marshal, who is appointed for each district, by the president and senate, for the term of four years, but removable at pleasure by the president. The executive officer of the state courts is the sheriff, who is elected biennially by the people of each county, as before described. The executive officer of the courts of justices of the peace is the constable; who is elected annually by the people of each township, as before described. The various duties of these officers are minutely defined by law, and will be often referred to hereafter. It is sufficient here to say, that all writs, orders, judgments, and decrees of their respective courts, are by them carried into execution. Their compensation is derived from fees, and they are under bonds for fidelity.

Attorneys. (b) Although parties are permitted to manage their

(a) 1 Black. 339; 1 Kent, 309; Watson's Sheriff; Dalton's Sheriff; Sheppard's Constable; Swan's Justice and Constable.

(b) See 3 Black. 25; 1 Kent, 306. If an attorney has applied to his own use money collected for his client, it is good cause to suspend him from practice. State v. Hand, 9 Ohio, 42. The court will not act upon charges made against an attorney, unless they be under oath. Ex parte Burr, 9 Wheat. 529. That an attorney has been stricken from the rolls of one court for a contempt, is not a sufficient reason for excluding him from another court. Ex parte Tillinghast, 4 Peters, 108. An attorney does not require a written appointment from his client as authority to appear for him. Osborn v. Bank U. S. 9 Wheat. 738. But see King of Spain v. Oliver, 2 Wash. C. C. R. 429. An attorney may contract to receive part of the property recovered as a contingent compensation; but a stipulation that no compromise shall be made without his consent, is illegal and void. Key v. Vattier, 1 Ohio, 132. In general, the act of an

own causes, if they so wish, yet the successful conducting of litigation involves so much formality and technicality, as generally to require a set of men educated for that express purpose. In England, these men are variously styled *attorneys*, *solicitors*, *advocates*, *counsellors*, *barristers*, and *sergeants*, according to their rank and duties. But in this country, we have but the two classes, *attorneys* and *counsellors*. These classes are recognized in the supreme federal court; and in some of the state courts; but not in the inferior federal courts, nor in the courts of this state. Where the distinction between attorneys and counsellors prevails, it consists principally in this; that attorneys do all things necessary to prepare causes for hearing, and counsellors conduct them at the hearing. The requisites for admission at the bar, are prescribed by law. In order to practice in the supreme federal court, as attorney or counsellor, one must have practiced three years in the highest court of the state to which he belongs. The inferior federal courts merely require a previous admission to the state courts. The requisites for admission to the state courts vary materially in the different states. In Ohio, they are as follows. The applicant must be of age, a citizen of the United States, and of good moral character; he must regularly have studied law some where for two years; and must have resided one year within the state. There is an exception, however, to this last requisition, when the applicant has been in practice two years in another state. These requisites may be evinced by the certificate of some attorney in the state; and they entitle the applicant to an *examination*. This is conducted either by two judges of the supreme court, or by a committee of the bar appointed by them. If the applicant be found qualified, the oath of office is administered, and his admission recorded. He is thereby authorized to act both as attorney and counsellor at law, and solicitor in chancery, in all the state courts. The only exception to the necessity

attorney in court binds his client. *Treasurer of Champaign v. Norton*, 1 Ohio, 270. Otherwise, if he appeared without authority. *Critchfield v. Porter*, 3 Ohio, 518. If an attorney improperly sue out process, he may be ordered to pay costs. *Kerr v. Bank of Chillicothe*, *Wright*, 737. If there be no special agreement for a fee, the attorney may recover the usual compensation. *Christy v. Douglass*, *Wright*, 485. An attorney's fees are not included in the term costs. *McDonald v. Page*, *Wright*, 121. The retainer of an attorney does not imply an undertaking to recover a judgment, but only to use due diligence in the ordinary course. *Gallaher v. Thompson*, *Wright*, 466. An attorney, as such, has no authority to make a compromise for his client. *Holker v. Parker*, 7 Cranch, 436; *Mayer v. Foulkrod*, 4 Wash. C. C. R. 511. His authority does not cease with recovering judgment. He may issue execution, though he cannot discharge it without satisfaction. *Union Bank v. Geary*, 5 Peters, 99; *Erwin v. Blake*, 8 Peters, 18. Appearance by attorney supersedes the necessity of process; but if an attorney appear without authority, he is answerable in damages. *Field v. Gibbs*, 1 Peters, C. C. R. 155, 455. An attorney is bound to disclose to his client if he have any adverse interest. *Williams v. Reed*, 3 Mason, 405. An attorney cannot be compelled, and will not be permitted to disclose facts communicated by his client in consequence of that relation. *Cheirac v. Reinicker*, 11 Wheat. 280; *Andrews v. Solomon*, 1 Peters, C. C. R. 356.

of being thus admitted, is that of attorneys resident in other states, which permit our attorneys to practice in their courts. Attorneys are regarded as officers of court, acting under the supervision of the judges, who have authority, upon good cause, to suspend them from practice. They are not required to produce a special authority from their clients, it being always presumed, until the contrary appears. They are responsible for reasonable diligence and skill, and are generally, though not always, permitted to regulate their own charges. To insure the utmost confidence and unreserve on the part of their clients, in giving them the necessary information, attorneys are excused from testifying in court, as to any thing professionally confided to them; a privilege not granted even to religious confessors.

Government attorneys. In all criminal proceedings, government is a party to the prosecution; and not unfrequently in civil proceedings. Hence the necessity of a special law officer to attend to its interests. The *attorney general* of the United States, is the regular law adviser of the president and heads of departments, and has the management of all causes in the supreme court, in which the federal government is concerned. There is likewise a *district attorney* for each district, to attend to causes in the circuit and district courts. These officers are appointed by the president and senate. A similar arrangement exists in many of the states. But in Ohio, there is no attorney general for the state. The only law agents for the government are *prosecuting attorneys* for each county, whose duty it is to conduct all criminal proceedings, and all civil suits, in which the state is interested. Until 1833, these officers were appointed by the court; but since then, they are elected biennially by the people of each county. It is much to be regretted that this change has been made. If any thing could impair their independence and firmness, in the discharge of a duty often odious, it would be this dependence upon popular suffrage. And yet upon the faithful, and even austere, performance of their duty, the good order of society mainly depends. They ought, therefore, to be placed above the temptation to court popularity.

§ 49. *Jurisdiction of the federal courts.* (a) From the organization of the federal and state courts we pass next to their *jurisdiction*. When a case is within the power of a given court, the court is said to have jurisdiction of it. This jurisdiction may either be *exclusive* or *concurrent*. A court is said to have exclu-

(a) The convention at first resolved, that the jurisdiction should extend to the collection of revenue, impeachments and questions involving the national peace and harmony. Mad. Pap. 860. The matter of impeachments was afterwards stricken out, and cases arising under national laws added—ib. 1137-S. But in the first draft of the constitution, a specific enumeration of the cases of jurisdiction was contained—ib. 1238, 1438-40. See Conkling on the Jurisdiction and Practice of the U. S. Courts; Duponceau on Federal Jurisdiction; 1 Kent, lec. 15-17.

sive jurisdiction of a case, when it cannot be brought before any other court; and to have concurrent jurisdiction, when the case may be brought before some other court. Again, jurisdiction may be either *original* or *appellate*. The jurisdiction is original in a given court, when the first proceedings may be commenced in that court; and it is appellate, when the proceedings must be commenced originally in some other court, and are thence transferred, for revision or correction, to the court in question. The regular methods of transferring a cause to a court of appellate jurisdiction, are by *appeal* and by *writ of error*, which will be fully described hereafter. It is sufficient here to say, that an appeal removes the cause entirely and in all respects, subjecting the facts, as well as the law, to a rehearing in the court above. Whereas, a writ of error leaves the facts as determined in the court below, and only carries up questions of law for re-examination. Such being the nature of jurisdiction in general, I shall examine the jurisdiction of the federal and state courts, in each of these points of view.

In considering the jurisdiction of the federal courts, two questions arise. *First*, how much jurisdiction is conferred upon them altogether? *Secondly*, how is this jurisdiction apportioned among them? And first, as to the whole amount of federal jurisdiction. If the United States had been organized into one consolidated nation, there would have been no difficulty in determining how far the judicial power should extend. It would manifestly have embraced all subjects of judicial cognizance without exception; and of course there would have been no necessity for a specification. But the federal government being limited as before shown, to certain specific national objects, this limitation applies as much to the judicial, as to the other departments; it being an obvious maxim that the three departments should be coextensive in their powers. The federal constitution does not, however, merely assert this general proposition and there stop; but in conformity with its general plan, it proceeds to enumerate specifically all the objects to which the judicial power shall extend. These are included under the nine following heads.

1. "To all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or to be made under their authority." (a) We have already seen that the federal constitution, laws, and treaties constitute the supreme law of the whole Union. And hence the clear propriety of making them cognizable by that judiciary, which alone represents the whole Union. The language, however, requires a *case* to be made; that is, a suit must be instituted, according to the regular course of judicial proceedings, to be described hereafter. The federal judges cannot be consulted upon mere abstract questions. The

(a) See *Osborn v. Bank U. S.* 9 Wheat. 738.

case may be either in law or equity, and of a civil or criminal nature. When such a case is presented, growing out of, or involving any provision of the federal constitution, laws, or treaties, it falls, for that reason, within the jurisdiction of the federal courts, without reference to the parties.

2. "To all cases affecting ambassadors, other public ministers, and consuls." The propriety of this is obvious, from the consideration, that these officers, representing foreign nations, are entitled to be treated according to the law of nations; and questions involving the law of nations ought clearly to be cognizable by the national judiciary.

3. "To all cases of admiralty and maritime jurisdiction." (a) The words *admiralty* and *maritime* are here synonymous. The cases included in this provision, are such as relate to the *high seas*, whether crimes, captures, injuries, or contracts; and the *high seas*, including all places where the tide ebbs and flows, not being within any country, constitute the grand highway of nations; and hence the propriety of referring all questions, having reference to this locality, to the national judiciary. My plan does not permit me to discuss the subject of admiralty jurisdiction. One of its peculiarities is, that it allows a proceeding *in rem*, against the thing itself, without reference to the owner, which the common law does not. The want of such a proceeding has been very much felt along our lakes and rivers; and several of the states have supplied the deficiency by special legislation. Courts of chancery, too, have not hesitated, under these circumstances, to exercise many of the powers of a court of admiralty.

4. "To controversies to which the United States shall be a party." This provision implies that the United States may sue; but does not authorize them to be sued. The presumption is held to be, that government will always do right to individuals without suit; but that individuals may not be so ready to do right towards government. And hence the propriety of authorizing government to sue, but not to be sued. This doctrine may be politic, but it is not magnanimous. However, the propriety that government should sue in its own courts, when it does sue, is manifest.

5. "To controversies between two or more states." (b) This provision proceeds upon the supposition that where two states are contending, the courts of neither are in a condition favorable to the administering of impartial justice to the other; whereas, the federal judiciary can be under no bias of self interest. Besides the general harmony is hereby better secured.

(a) See Dunlap's Admiralty Practice; Clerke's Admiralty Practice, by Hall; 10 Wheat. 429; 7 Peters, 343; 11 Peters, 175.

(b) It was proposed in the convention, that this, and the next class of controversies, should be decided by a singular species of arbitration, conducted under the supervision of the senate; but this proposition was negatived, 8 to 2. Mad. Pap. 1236, 1416.

6. "To controversies between a state and citizens of another state." (a) Here, again, it is supposed that the state tribunals might not be impartial; and the national judiciary is therefore selected. It was early made a question, whether this provision authorized suits *by individuals against a state*, or only by a state against individuals. The Federalist thought that it authorized only the latter; but the supreme court decided that it authorized both. This decision occasioned the eleventh amendment of the federal constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state." Accordingly, no individual can now sue a state, unless it be in the courts of that state, and by its own consent. But it has been decided, that where a state first sues an individual, and afterwards, in the progress of that suit, becomes *defendant in error*, this, not being an original suit against the state, is not prohibited by the amendment.

7. "To controversies between citizens of different states." The word "citizens," here means *residents*, there being no such thing as state citizenship. The reason of this provision is of the same nature as of the two preceding.

8. "To controversies between citizens of the same state, claiming lands under grants from different states." Here the rights of the two states to make the grant, would be put in issue; and it is therefore supposed that the courts of neither state would be in a condition to decide without bias.

9. "To controversies between a state or the citizens thereof, and foreign states, citizens, or subjects." This provision supposes that neither foreign states, nor foreign individuals could have the same assurance of impartial justice from the tribunals of a state, with which, or with whose citizens, the controversy was depending, as from the federal tribunals.

It will be observed, that of these nine classes of cases, only the first and third have reference to the subject matter of controversy. In the remaining seven, the jurisdiction depends upon the character of the parties alone, without regard to the subject matter. Hence results the important consequence, that the jurisdiction of the federal courts embraces every possible variety of litigation. And it is this which renders the decisions of the supreme federal court so exceedingly valuable as a body of general law, having the very highest authority throughout the whole Union. These nine classes include all the cases of which the federal courts can entertain jurisdiction; so that its extent is thus definitively ascertained. And the next inquiry is, how it has been *apportioned* among the federal courts.

(a) *Chisholm v Georgia*, 2 Dall. 419; *Cohens v Virginia*, 6 Wheat. 264.

Jurisdiction of the supreme court. This court being intended chiefly for the tribunal of last resort, exercises very little original jurisdiction. The constitution declares that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." And on the principle, that the affirmation of a power in specified cases, excludes it in all cases not specified, it has been held that the original jurisdiction of the supreme court comprehends these cases only, and Congress can extend it no further. It has also been held, that even in these specified cases, original jurisdiction is not confined absolutely to the supreme court, but may be vested in the inferior courts. In a word, the supreme court can have original jurisdiction in no cases but these, and it need not necessarily have it even in these. This limitation thus interpreted, is the only limitation upon the discretion of Congress, in the *apportionment* of federal jurisdiction. For the next provision declares, that "in all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the *Congress shall make.*" At first, there was great opposition to this proposition, on account of the phrase "*both as to law and fact.*" It was apprehended that Congress might assume to authorize the supreme court to reverse the verdict of a jury as to matters of fact, and thus greatly impair the right of trial by jury. This far-fetched objection occasioned the seventh amendment, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This amendment, therefore, entirely removes the objection before mentioned. And, accordingly, Congress may exercise a complete discretion in the apportionment of jurisdiction, with the above exception as to the original jurisdiction of the supreme court.

In pursuance of this discretion, Congress, by the act of 1789, created the present judiciary system. By this act the appellate jurisdiction of the supreme court is as follows. It revises *on writ of error*, all final decisions of the *Circuit Court* in civil actions at law, originally commenced there, or brought there by appeal from the district court, where the value in controversy exceeds two thousand dollars. And it revises, *on appeal*, all final decisions in cases of equity and admiralty jurisdiction, involving the same amount. The reason of the distinction here made between a writ of error and appeal, is this: the supreme court has no jury to try facts in any case; but it is the peculiarity of equity and admiralty proceedings, that the court decides both law and fact without a jury; the evidence being all taken in writing. In these cases, therefore, an appeal, which brings

up both law and fact, is the proper course. But in actions at law, which require a jury, the facts are settled in the court below, and the writ of error only brings up the questions of law. The value, which is thus made the predicate of appellate jurisdiction, is fixed thus high, in order to preserve the dignity of the supreme tribunal, and at the same time prevent it from being overwhelmed with a multitude of cases. It will be observed that the supreme court has no *appellate criminal jurisdiction*. Provision is made, however, that in all cases civil and criminal, where the judges of the circuit court differ in opinion, so as to prevent a decision, the point of disagreement shall be *certified* up to the supreme court for decision.

It has been much doubted whether the constitution intended to allow an appellate jurisdiction from the *state courts*. But inasmuch as the federal judiciary was designed to be the interpreter of federal powers, and as these powers may be brought into discussion in the state courts, it is reasonable to presume that in such cases at least, the constitution intended that the supreme court should exercise a supervisory power over the decisions of the state courts; for otherwise the federal government would be thus far at the mercy of the state governments. Accordingly the judiciary act has wisely provided, that the final decisions of the highest court of law or equity in any state may be revised by the supreme court, on *writ of error*, in the two following classes of cases. 1. Where the validity or construction of the federal constitution, laws, or treaties, or of any commission or authority derived therefrom, shall be drawn in question, and the decision shall be against it. 2. Where the validity of a state constitution, law, or authority shall be drawn in question, on the ground of repugnancy to federal power, and the decision shall be in its favor. This appellate jurisdiction has been exercised in some of the most important cases that have as yet been brought before the federal judiciary; and though it even now meets with strenuous opposition from the advocates of state supremacy, yet no one can doubt that the consequences have thus far been in the highest degree salutary.

Jurisdiction of the circuit court. This is both original and appellate. The circuit court has *original* jurisdiction of all civil suits at law and equity, where the value in dispute exceeds five hundred dollars, and the United States are plaintiffs; or one party is an alien; or the suit is between a citizen of the state where it is brought, and a citizen of another state; or against a citizen of the same state, claiming lands under a grant from another state. But this jurisdiction is concurrent with the state courts; and provision is made for removing such suits commenced in the state courts, at the instance of the defendant, into the circuit court. It also has original jurisdiction of all suits involving copyrights and patents; and of all crimes punishable under the

federal authority. And this criminal jurisdiction is final, unless there be a disagreement between the judges, to be certified to the supreme court. The circuit court has *appellate* jurisdiction from the district court by writ of error or appeal, in the following cases: *first*, in civil actions at law, where the value in dispute exceeds fifty dollars, by writ of error; and *secondly*, in admiralty cases, where the value in dispute exceeds three hundred dollars, by appeal. But it has no appellate jurisdiction in cases of equity, or in criminal cases. In these cases of appellate jurisdiction, if the judges differ in opinion, that of the supreme judge prevails, since these cannot be certified to the supreme court.

Jurisdiction of the district court. This court has jurisdiction of the following cases; *first*, of all admiralty cases; *secondly*, of all seizures, penalties, and forfeitures under the laws of the United States; *thirdly*, of all injuries in violation of the law of nations or of treaties, where an alien sues; *fourthly*, of suits brought by the United States, where the value in dispute amounts to one hundred dollars; *fifthly*, of suits against consuls, suits to repeal patents, and suits concerning captures; and *sixthly*, of crimes punishable under the federal authority, when the punishment does not exceed a fine of five hundred dollars, or imprisonment for six months, or thirty-nine lashes. In some of these cases, the jurisdiction is exclusive both of the circuit court and of the state courts; and in others, it is concurrent with both.

§ 50. *Jurisdiction of the state courts.* It only remains to describe the jurisdiction of our state courts, and this may be done in a few words. The *supreme court* of Ohio has original jurisdiction, concurrent with the common pleas, of all civil cases both in law and equity, where the value in dispute exceeds one thousand dollars; and of all capital offences. It has appellate jurisdiction, by writ of error and appeal, of all civil cases, both in law and equity, in which the common pleas has original jurisdiction; and of criminal cases, by writ of error only. It also has jurisdiction of all cases of divorce and alimony. And its power to issue the various remedial and prohibitory writs, is commensurate with the usages of the common law. The court of *common pleas* has exclusive original jurisdiction of all civil cases, both in law and equity, where the value in dispute is between one hundred and one thousand dollars, with the exception of land cases. If the value in dispute exceed one thousand dollars, its original jurisdiction is concurrent with the supreme court; if it be under one hundred dollars, with justices of the peace. It has exclusive original jurisdiction of all criminal cases, not capital; and concurrent jurisdiction with the supreme court in capital cases, and cases of divorce and alimony. It has appellate jurisdiction, by *appeal* and by *certiorari*, from justices of the peace, in all civil cases within their jurisdiction; and also from the county com-

missioners. It has exclusive jurisdiction of all probate and testamentary matters, matters of guardianship, and licenses. And with the exception of those writs which are peculiar to the highest court, it has the same general power to issue writs as the supreme court. *Justices of the peace* have jurisdiction of all civil cases within the value of one hundred dollars, with the exception of a few specified cases, which peculiarly require the verdict of a jury; and where the judgment is voluntarily confessed, within two hundred dollars. With a few special exceptions their civil jurisdiction is confined to their respective townships. Their criminal jurisdiction, which is merely preliminary, and confined to examination and commitment for trial, comprehends all offences, and extends through the county. They likewise have jurisdiction of some special cases, as controversies between masters and apprentices; trials of the right of property taken on execution or attachment; and actions of forcible entry and detainer. They also have the general power to administer oaths, and take acknowledgments of deeds.

LECTURE IX.

ENUMERATED POWERS. (a)

§ 51. *Power as to revenue.* In the three preceding lectures we have examined those provisions of the constitution which relate to the organization of the three great departments of government. I have already remarked, that all the remaining provisions may be classed under the general head of *limitations of delegated power*; but that they are subdivided as follows; *first*, enumera-

(a) It would seem that the convention did not at first contemplate a specific enumeration of the powers of Congress. The first proposition was, that Congress should have power to legislate in all cases where the Congress of the confederation could legislate; and in all cases to which the states were incompetent, or where state legislation might interrupt the harmony of the Union; and to negative all state laws contravening the constitution or treaties. Mad. Pap. 759—761, 859. This proposition was then modified by striking out the power to negative state laws, adding the power to legislate in all cases for the general interests of the Union, and declaring the supremacy of treaties and acts of Congress—ib. 1114—19, 1221. The resolution was then referred to the committee of detail, who reported a specific enumeration of the powers of Congress—ib. 1221, 1232. Propositions were made to extend this enumeration much farther than it actually goes; as to create corporations; to establish a national university and other seminaries of learning; to grant premiums for the promotion of useful knowledge; to encourage agriculture, commerce, and manufactures, by establishing public institutions, rewards, and immunities; to regulate stages on post-roads—ib. 1354—5; to pass sumptuary laws—ib. 1369, 1568; to regulate damages on protested bills—ib. 1448; and to construct canals—ib. 1576. See also 1 Kent, lec. 12, 18, 19.

ted powers of the federal government; *secondly*, incidental powers; *thirdly*, powers prohibited to the federal government; and *fourthly*, powers prohibited to the states, by the federal constitution, and by their respective constitutions. These provisions likewise admit of a more general subdivision as follows: *first*, direct limitations, whether by enumeration or prohibition; and *secondly*, indirect limitations, by declarations of rights. But instead of following strictly either of these classifications, I shall adopt the arrangement suggested by the subject matter, to which these provisions relate. Accordingly, while I commence with the enumerated powers of the federal government, I shall discuss in connection therewith, all the federal and state prohibitions, relating to the same subject matter.

The *revenue power* is conferred in the following words: "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." (a) It is of course indispensable to the very existence of government, that it should have the power of raising a revenue adequate to its necessary expenditures. But at the same time, as the power of taxation is one of the most dangerous powers with which government is intrusted, and has been more frequently abused than any other, it requires to be guarded with peculiar care. And this is especially necessary with respect to the federal government, being professedly one of limited powers. The clause above quoted, has probably given rise to more discussion than any other in the constitution. Even its grammatical construction is a matter of controversy. Some have contended that the words, "to pay the debts and provide for the common defence and general welfare," confer distinct and substantive powers, unconnected with the taxing power. It is a sufficient objection to this construction, that it would make the federal powers unlimited, and the specific enumeration which follows this clause, unmeaning, if not absurd. If Congress has the general power to do whatever it deems will promote the common defence and general welfare of the country, this single grant of power includes more than all the specifications together, and of course supersedes them all. Others, however, contend that the clause conveys a general and substantive grant of power, to be explained and limited by the subsequent specifications, and in its turn to illustrate them; but having no meaning by itself alone. It is a sufficient objection to this construction, that it virtually obliterates these words from the constitution; since, if the words were taken away, the aggregate power of Con-

(a) See Mad. Pap. 1339-43, 1485, 1549, 1611. I have put a comma, instead of a semicolon, after the word "*excises*," because it appears that the clause was so reported to the convention by the committee. See 2 Story Const. 367; 1 Kent, 254.

gress would remain the same. What then is the true construction of this clause? The weight of reason as well as authority, makes these words a qualification of the taxing power. The whole provision means the same as if the words were "*in order to pay the debts and provide for the common defence and general welfare.*" Thus while Congress is not limited by this clause, as to the *subjects* upon which taxes may be levied, it is limited as to the *purposes* for which they shall be levied. Congress cannot wantonly exercise the taxing power for any purposes whatsoever; but only for the specified purposes, of paying the debts and providing for the common defence and general welfare. Even this construction still leaves a vast discretion in Congress, as to the appropriation of the revenue; but it seems to be the only one which the clause will rationally bear.

Such then being the general import of the clause, let us examine its terms more particularly. Four words are employed to describe the taxing power, namely, "*taxes, duties, imposts, and excises.*" Of these, the word "*taxes*" is universal, including not only the other three, but also every species of contribution levied by government; "*duties*" include impositions laid upon any kind of commodities in any situation; "*imposts*" usually signify impositions laid upon imported articles; and "*excises*" are impositions exacted upon the manufacture, retail, or consumption of commodities. Probably the only reason for employing these four terms, was an anxiety to include every species of taxation in the general grant of power. All taxes are primarily divided into *direct* and *indirect*. Direct taxes are those which are levied directly upon the person or property of individuals. Indirect taxes are those which are levied upon the privilege of doing some act; generally in relation to property, as buying, selling, importing, exporting, and the like; but sometimes in relation to certain occupations or professions, as banking, insuring, and the like; and which may consequently be avoided by foregoing the privilege taxed. The constitution elsewhere provides, as we have seen, that "*direct taxes shall be apportioned among the several states according to their respective numbers;*" and again, to the same effect, that "*no capitation or other direct tax shall be laid, unless in proportion to the census.*" This was a part of the compromise between the states respecting slaves, already described. The slave-holding states bear an increased proportion of direct taxation, in return for their increased representation, both being measured by the same rule of apportionment. (a) In construing an act of 1794, which laid a tax upon carriages, it was decided that the constitution intended to include, under the description of direct taxes, only two species; namely, a tax upon the person,

(a) This rule of direct taxation was adopted in the convention by a vote of 10 to 1. Mad. Pap. 1379.

called a poll or capitation tax, and a tax upon land. (a) This, therefore, may be regarded as the established construction; and consequently all taxes not levied directly upon persons or land, are to be treated as indirect taxes. The constitution then declares that "all duties, imposts, and excises, shall be uniform throughout the United States." And it follows from what has just been said, that this is equivalent to declaring that all indirect taxes shall be laid by the rule of uniformity. Again, in construing the act of 1815, which laid a direct tax upon the District of Columbia, it was decided that although representation and direct taxation are measured by the same rule, they are not dependent upon each other; and therefore a district or territory not represented in Congress, may be constitutionally required to pay a direct tax. (b)

(a) In *Hylton v. United States*, 3 Dallas, 171, the facts were these. In 1794, Congress passed a law laying a tax upon carriages. This tax was laid by the rule of uniformity. Hylton refused to pay, on the ground that a tax on carriages was a direct tax, and therefore could only be laid by the rule of apportionment. The court decided that it was not a direct tax, and was therefore properly laid by the rule of uniformity. This is the only point the case decides. But the court expressed their opinions fully on the nature of direct taxes. They thought there were but two kinds of direct taxes, namely, a capitation or poll tax, and a tax on land. These were the only taxes that could, with any show of reason or convenience, be laid by the rule of apportionment according to the census. The provision was inserted in favor of the southern states. They had a large number of slaves, and a thinly peopled territory; while the other states had but few slaves, and a thickly peopled territory. Now to make the southern states pay as much for each acre of land, or each individual person, including slaves, as the other states paid—which would be the case by the rule of uniformity—was manifestly unjust. To save them, therefore, from such an imposition, was the intention of the constitution. But the same reason would not exist in regard to any other species of taxable property, as carriages, for example. A carriage in the south was worth as much as a carriage in the north, and ought to pay as much tax. The inference is, that the convention had in view no other taxes, as direct, than the capitation and land taxes. These were to be apportioned to each state according to its census. As a rule of taxation, it was radically wrong on general principles; and could only be vindicated by considering, that it was resorted to for the sake of compromise.

(b) In *Loughborough v. Blake*, 5 Wheaton, 317, the single question presented to the court was, whether Congress had a right to impose a direct tax on the District of Columbia? The decision was, that Congress had this right. The general grant of power to lay and collect taxes, duties, imposts and excises is without limitation as to place. And the declaration that all such taxes should be uniform throughout the United States, is proof that the power was to extend through the Union. This grant of power includes direct taxes as well as others. And the provision that direct taxes shall be apportioned according to numbers, did not abridge this grant of power. The object of this provision is simply to fix a standard of apportionment, and not to exempt from taxation those who are not represented. Representation is not made the foundation of taxation. Taxes are not apportioned to representatives, but to numbers. The words are "no capitation or other direct tax shall be laid, *unless in proportion to the census*." Now wherever a census is taken, this rule may be applied, as well in the District or territories, as in the states. The District, therefore, is not only within the general grant of power, but within the restriction as to the rule. Direct taxes may be proportioned to numbers here, as well as in the states. Congress is not obliged to extend direct taxation to the District and territories, as it is to all the states, when it taxes any. But it has the power, if it choose to exercise it, for there is no limitation. But if Congress had not possessed this power, by the general grant, it would clearly derive it from the power of exercising "exclusive legislation in all cases whatsoever within the District."

The next provision connected with revenue, is a prohibition to the United States. "No tax or duty shall be laid upon articles exported from any state. (a) No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." (b) The object of these prohibitions is the same as of that provision which establishes uniformity as the rule of indirect taxation; namely, to secure the states against partiality or favoritism. If *exports* could be taxed, it would be in the power of Congress to injure or even destroy the staple products of a particular state, and also to cramp the general industry of the country. If inducement could be given to *import* into one state rather than another, Congress might build up the ports of one state upon the ruins of those of another. And finally, the same result might be produced, if Congress could control the *coasting trade*, so as to require vessels bound to or from one state, to enter, clear, or pay duties in another.

The only remaining provision is a prohibition to the states. "No state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports and exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No state shall, without the consent of Congress, lay any duty of tonnage." (c) This is the only federal limitation of the taxing

These words are as broad as words could be. But it is said they must be limited by the great principle, that representation is inseparable from taxation; what then? Is the District to be entirely exempt from taxation, because it has no representative in Congress? This is not contended for. It is admitted that indirect taxes may be laid, in the form of duties, imposts and excises. Congress is obliged to extend such taxation to the District, if it extend it any where. And where is the difference, in principle, between this kind of taxation and the other? There is none. If the rule of uniformity protects the District against oppression in the one case, the rule of apportionment will equally protect it in the other. On the whole, the court could see no reason for making an exception, when the constitution makes none.

(a) This prohibition to tax exports was strenuously resisted in the convention, but finally passed by a vote of 7 to 4. Mad. Pap. 1379-88, 1566-9.

(b) See Mad. Pap. 1430-2, 1440.

(c) See Mad. Pap. 1447, 1584-6. *Brown v. Maryland*, 12 Wheat. 419; *Raguet v. Wade*, 4 Ohio, 107; *Perry v. Torrence*, 8 Ohio, 521. In *Brown v. Maryland*, 12 Wheaton, 419, the question was, whether a law of Maryland, requiring *all persons selling imported articles by wholesale*, whether importers or not, to pay fifty dollars for a license, in the same manner as retailers were required to do, was constitutional? The court held that this law was repugnant to two provisions of the constitution; first, that which prohibits the states from laying any imposts or duties upon imports or exports; and, secondly, that which gives Congress the power of regulating commerce with foreign nations, and among the several states. I shall here abstract only what relates to the first ground of unconstitutionality. The word "imports" means "things imported." The prohibition, therefore, is not confined to duties on the *act of importation*, but includes duties on the *articles imported*. It extends to duties levied upon the articles *after* they have entered the country, as much as *while* they are entering. This is evident from the *exception* to the prohibition, namely, "except what may be

power of the states. The object manifestly is to preserve harmony, by preventing the states from exercising the taxing power to the injury of each other, or of the Union. But inspection laws being designed to improve the character of state products, and prevent impositions in their sale, the states are permitted to enact them. Yet lest this permission should be made a pretext for other objects, such laws are required to have the assent of Congress. And to remove all temptation to tax imports or exports for the purpose of revenue, the net proceeds are declared to belong to the national treasury. The same remarks apply to the prohibition of a tonnage duty. In deciding against the constitutionality of a law of Maryland, requiring all persons selling imported articles by wholesale, to pay a license, it was held that this prohibition is not confined to taxes laid on the act of exportation or importation, but includes taxes laid upon the articles themselves, either before they leave the state, or after they are brought into it. But it is obvious that there must be some period when imported articles fall within the taxing power of the states; and in general terms that period is, when they have become so mixed up with the mass of property in the state, as to lose their distinctive character of imports. And accordingly, a law of Ohio, laying a tax upon the capital of all merchants trading in foreign or domestic goods, was held to be constitutional; because it treated the capital of merchants like

absolutely necessary for executing its inspection laws." Now, inspection laws must from their nature, act upon imported articles after they are landed. And this exception was made, because the tax would otherwise have been within the prohibition. The law of Maryland, therefore, which acts upon the *selling* of imported articles, is not shielded by the fact, that it only acts upon goods after they are brought within the state. The power of requiring a license to sell, implies the power of prohibiting the sale, by making the license so great that no one will pay it. If, then, Maryland possess this power, she could, if so minded, prohibit importation entirely; for no goods would be imported, if none could be sold. It is no answer to say that a state will have too much consideration for its own interest to do this. For, without increasing the license to the extent of prohibition, it would be very likely to be carried so far by the importing states, as to impose an onerous tax upon the non-importing states. And this was the very evil against which the constitution intended to guard. It is true, that there must be some period when imported goods must fall under the taxing power of the states. That period is, when they have ceased to be considered *imports*, within the meaning of the constitution. And there is great difficulty in ascertaining precisely what that period is. But it is sufficient for the present case, to say generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has lost its distinctive character as an import, and become subject to the taxing power of the state. But while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty upon imports, to escape the prohibition in the constitution. No weight is due to the argument that this is not a tax upon the *article*, but upon the *person* importing it. For it is manifest that a tax on the *sale* of an article imported only for sale, is a tax on the article itself. In general a state may tax *occupations*, because the constitution does not forbid it. But unless the persons employing the individual whose occupation is taxed, themselves pay the tax, it must still be a thing taxed through a person. A tax on the occupation of an importer, is a tax on importations; and this, a state cannot impose, because the constitution forbids it.

that employed in all other operations, and only indirectly and remotely affected imports or exports.

The result of the foregoing provisions is, that Congress may lay any kind of tax for the purpose of paying the debts or promoting the defence or welfare of the Union, except a tax on exports; that direct taxes, including taxes on persons and land, are to be laid by the rule of apportionment, and all other taxes by the rule of uniformity; and that the states are only prohibited from taxing imports, exports, and tonnage. It is now many years since Congress has found it necessary to lay a direct tax; and accordingly, the slave-holding states have had all the benefit without the burthen of the compromise. The revenue arising from indirect taxation has been sufficient to pay off an immense national debt, besides defraying the current expenses of government; and this revenue, with the exception of the proceeds of the public lands has been derived almost solely from duties on imports. The experiment of an excise has been tried on distilled spirits, for example; but in 1793 it produced the insurrection in Pennsylvania; a fact which strongly illustrates the unpopularity of this species of taxation. Indeed, experience has proved that a tax on imports is most cheerfully paid, because least felt by those upon whom it ultimately falls.

From the view now taken, it follows that the states must depend chiefly, if not entirely, upon direct taxation, in the literal sense of these words; since the power of indirect taxation is mostly taken away. The constitution of Ohio contains no limitation upon the taxing power of the state, except the prohibition "to levy a poll-tax for county or state purposes." (a) By a *poll-tax* is here

(a) *State v. Gazlay*, 5 Ohio, 14; *State v. Proudfit*, 2 Ohio, 61; *State v. Hibbard*, 3 Ohio, 61. In the *State v. Gazlay*, the taxing power of the Ohio legislature under the state constitution, was drawn in question. This constitution contains no express grant of power to impose any tax whatever. The only provision on the subject of taxation is a prohibition, in the following words: "The levying taxes by the poll is grievous and oppressive, therefore, the legislature shall never levy a poll tax for county or state purposes." But this prohibition of one particular species of tax, contains by implication, a grant of power to lay any other, so that it be not repugnant to the state or federal constitution. And such has been the practical construction by our legislature. We levy taxes not only upon property of every description, but upon professions and occupations. In a word, as the court observed, in *Ragnet v. Wade*, 4 Ohio, 107, the power to tax, so long as it does not contravene the federal constitution, "is an unlimited sovereign power." The question in the present case was, upon the right to tax the professions. A law was passed, laying a tax not exceeding five dollars, upon all practising lawyers and physicians. *Gazlay* was regularly licensed and admitted to practise, before this law was passed, and one of his grounds for refusing to pay the tax was, that the license to practise was a contract, and subsequent taxation was a violation of that contract. But the court said that a law providing for a license, was made for the public benefit, and not to confer any vested privileges. It might therefore, be modified whenever the public welfare required it. Another ground of objection was, that this was a capitation or poll tax. This, the court denied. It was a faculty tax, and not a personal one. It had express reference to the ability to pay, and the amount was to be fixed by the amount of profits. In a word, it was a tax upon lucrative professions, and as proper as any other tax upon occupations or franchises. As to its being opposed to the general spirit of our institutions, this was too vague an objection to be examined.

meant a personal or capitation tax, the objection to which is, that it operates unequally upon the poor and the rich, by being the same for all, and not in proportion to the means of each. But the prohibition does not include taxation for township purposes; and it has also been decided not to include a tax upon professions, as those of law and medicine, sometimes called a faculty tax. We have already seen that by the ordinance of 1787, no tax can be laid upon the public lands within our limits until sold by Congress; and that the lands of non-residents cannot be taxed higher than those of residents. We have also seen, that by the terms of admission into the Union, Ohio has relinquished the power of taxing lands sold by Congress, until five years after the sale. With the exception, therefore, of these limitations, and those of the federal constitution, our legislature is unrestrained in the levying of taxes. And I shall conclude this outline, with a brief account of the various kinds of taxes in this state, and the subjects upon which they are levied.

The various *kinds* of state taxes are as follows. *First*, the *state tax*, the rate of which is fixed by the legislature for each year. *Secondly*, the *county tax*, the rate of which is fixed by the county commissioners, within certain limits, varying according to the property in the county, but not to exceed five mills to the dollar; unless it be for erecting buildings, or paying debts; and then, not to exceed seven and a half mills. *Thirdly*, the *township tax*, the rate of which is fixed by the township trustees, but not to exceed one mill to the dollar. *Fourthly*, the *school tax*, the rate of which is fixed by the legislature; but the county commissioners may add one fourth of a mill if they think proper. *Fifthly*, the *school house tax*, the rate of which is fixed by the voters of the school districts, but not to exceed two hundred and seventy-five dollars in one year. *Sixthly*, the *poor tax*, the rate of which is fixed by the county commissioners, but not to exceed one mill to the dollar. *Seventhly*, the *poor house tax*, the rate of which is fixed by the county commissioners without limit.

The *subjects* of state taxation are as follows. *First*, *real property*, including land and buildings. Formerly land was divided into three classes, designated as first, second, and third rate; each rate being taxed at so much per hundred acres, without regard to situation. But in 1825, the *ad valorem* system was adopted; according to which, the land belonging to each individual is appraised by itself, and a per centum assessed upon that appraisement. This is the only equitable system. It makes land contribute according to its value, taking all circumstances into consideration. To encourage improvement of wild land, all buildings not situated in towns and villages, except dwellings of the value of two hundred dollars and upward, are exempted from taxation. Also, for obvious reasons, lands devoted to public, literary, religious, and charitable purposes, are exempted. *Secondly*,

personal property, including the capital of merchants, manufacturers, and brokers; money at interest; steam-boats; pleasure carriages; and horses and cattle over three years old. *Thirdly, privileges or franchises*, including banking, insurance, and bridge companies, which pay a per centum on their dividends; (a) and practising lawyers and physicians, who pay a tax not exceeding five dollars, according to their income. To which may be added various licenses for taverns, shows, pedlars, auctioneers, and the like, which I have not room to particularize.

§ 52. *Power to borrow money.* (b) Congress has the general power, "to borrow money on the credit of the United States." This is intimately connected with the revenue power, and almost equally indispensable. In tranquil times, the amount required for national expenditures will not vary essentially from year to year; and by means of estimates from the treasury department, the revenue system may be easily adjusted to meet the average. But in case of war, or any other contingency, which either greatly increases the necessary expenditures, or diminishes the estimated revenue, or both, the exercise of the power to borrow money becomes absolutely necessary. When a public debt has thus been contracted, arrangements are usually made for paying it off gradually, by means of a sinking fund, and the revenue system is adjusted accordingly. In this way the burthen is so distributed as to be scarcely felt. Thus in 1816, our public debt exceeded one hundred and twenty millions. In the course of eighteen years it was wholly paid off, and the question was, how to dispose of the surplus revenue. This power of Congress does not conflict with the exercise of a similar power by the states, for their own wants. They accordingly contract debts at their pleasure. Thus in 1825, the state of Ohio, with no surplus revenue, undertook to construct, upon credit alone, her immense canals, which already extend more than four hundred miles. And it has been computed that the aggregate of debts thus contracted by the different states amounts to two hundred millions of dollars, which is about one fifth of the public debt of France, and about one twentieth of that of Great Britain. For these debts the creditors depend solely upon the good faith of their debtors. There seems to be a peculiar propriety in contracting debts of this kind for lasting and valuable improvements. They

(a) But the states have no power to tax the stock of a national bank. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank U. S.*, 9 Wheat. 738. And they cannot alter the rate of taxation specified in the charters of their own corporations. *State v. Commercial Bank of Cincinnati*, 7 Ohio, part 1, 125. But see *Portland Bank v. Apthorp*, 12 Mass. 252, where it is held that banks may be taxed, though no such power was reserved in their charters.

(b) When this clause was originally reported to the convention, it included a power "to emit bills." *Mad. Pap.* 1232. This was afterwards stricken out by a vote of 9 to 2, for the avowed purpose of prohibiting paper money. *Ib.* 1343-6.

are in fact constructed for the benefit of posterity, and it is but just that posterity should share the burthen of paying for them. Indeed upon no other principle would great public works be undertaken. The present generation would rather forego their share of benefit, than consent to bear the whole burthen. Still it cannot be denied that this power over the public purse, is the most dangerous power intrusted to government. And hence the paramount necessity of surrounding it with all possible safeguards. To this end, both the federal and state constitutions provide, that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." In other words, the consent of the legislature must be given before hand, for expending money, as well as for raising it; and that the people may know what their representatives do in this behalf, it is further declared that "a regular statement and account of the receipts and expenditures of the public money shall be published," for their information.

§ 53. *Power to regulate commerce.* (a) Commerce, in its most enlarged signification, comprehends every description of intercourse between man and man. In its legal acceptation, it includes whatever relates to the exchange of commodities between individuals and nations. In civilized life, scarcely any individual consumes exactly what he produces. If the products of the earth were every where the same—instead of varying, as they do, with the almost infinite diversities of soil and climate—even then the division of labor, ever extending with the progress of society—until the sphere of productive effort assigned to each laborer is contracted within the smallest possible limits—would still make a countless number of individuals contribute to supply the wants of each; so that traffic between man and man would even then be immense. But when to the results of the division of labor among individuals of the same vicinity, we add the results of that endless variety of soil, climate, taste, and character, by which the different portions of the globe and its inhabitants are distinguished from each other, we find that traffic between man and man in the same nation, almost dwindles into insignificance, when compared with traffic among the nations of the earth. And it is only when we contemplate commerce on this enlarged scale—when we think of all the productions of human labor, in every region of the earth, as passing from hand to hand, in an almost ceaseless process of exchange and distribution—that we can form an adequate conception of the importance of commerce, and of that part of the law, by which its vast operations are regulated. In general terms, *commercial law*, *lex mercatoria*, or

(a) The convention were so generally impressed with the necessity of this power that it occasioned little debate. Mad. Pap. 1343, 1450-6. The principal question was whether two thirds should be required to pass laws for this end.

the *law merchant*, comprehends all that portion of the municipal law which relates directly or indirectly to the buying, selling, or transporting of merchandize. I shall have occasion to consider its various subdivisions hereafter, and will, at present, merely indicate them. The persons engaged in commerce are called *merchants*, meaning, thereby those who make a business of buying and selling. Others buy to consume; the merchant buys to sell again. He stands between the producer and consumer, buying of the former, and selling to the latter. A distinction is sometimes made between wholesale and retail dealers, according to which, those who buy and sell in large quantities, are called merchants, and those who deal in small quantities, *traders*. In this view, traders are those who buy of merchants, and sell to consumers. This, however, is a distinction in degree, rather than kind, for in the eye of the law they are all equally merchants. But merchants seldom transact business alone. Sometimes they are associated as members of a *corporation*, sometimes they form a *partnership*, and sometimes they sustain the relation of *principal and agent*. So far then as persons are concerned, commercial law includes that which regulates all these relations. And passing from persons to things, we come first to the law governing the contract of *sale*, the *warranty* either of title or quality connected therewith, and the *weights* or *measures* by which quantity is determined. If the sale be for cash, this brings up the law relating to *money* or other *currency*. If the sale be on credit, the law relating to *book accounts*, *bills of exchange*, *promissory notes*, and *contracts of guaranty*, comes into application; and perhaps, also, the law regulating *bankruptcy* or *insolvency*. Passing, then, from the sale to the transportation of merchandize, we have first, the law governing *carriers* in general, together with all those particular regulations which apply to *shipping*; and next, the law of *insurance*, of *stoppage in transitu*, of *lien*, *revenue laws*, and, in case of war, *belligerent* and *neutral rights*. Of this extensive body of law, a large proportion is unwritten, has come down to us from distant ages, and is nearly the same in all commercial nations. But in this connexion, I am to discuss only those topics suggested by the provisions of the constitution.

One of the most palpable defects in the articles of confederation, as evinced by a short experience, was the absence of all provision for regulating commerce. This occasioned the meeting at Annapolis, which recommended the convention at Philadelphia, and thus led eventually to the formation of the constitution, in which this defect is abundantly cured. The words of the provision are these. "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This language is construed in its most enlarged sense. The term "*commerce*" includes navigation as well as traffic, and

every description of navigation and traffic; and the power "*to regulate*" includes the power to make rules for the whole subject matter. This may be illustrated by the case of the *United States v. Brig William*,^(a) where it was held, that under this power Congress may lay an embargo or pass a law of non-intercourse, the effect of which is, for the time being, entirely to suspend foreign commerce. This power is, moreover, exclusively vested in Congress by the force of the terms employed; for how could Congress regulate commerce, if the states could pass countervailing regulations? But the clause enumerates three branches of commerce, which require a separate consideration.

Commerce with foreign nations. This branch of commerce is altogether a national concern; and hence the propriety of committing it to the exclusive control of the national government is obvious. This control is exercised, first, by *treaties*, and secondly, by *acts of Congress*.

Commercial treaties. Free trade throughout the world, however agreeable in theory, is not a principle of the law of nations, and has not been favored by their practice. Every nation has the absolute and exclusive right, either to prohibit altogether the admission of foreign persons or products into its jurisdiction, or to prescribe and enforce the conditions upon which they shall be admitted. The terms of commercial intercourse, therefore, between the United States and every other commercial nation are determined by treaty. What these terms are, according to existing treaties, it is not my purpose to detail. It is clear, however, that the only basis upon which a nation can treat, with due self respect, is that of complete reciprocity. Accordingly, we extend to other nations the same commercial privileges which they extend to us. If they give us free trade, we give them the same. If they lay restrictions on our commerce, we lay corresponding restrictions on theirs. If they prohibit our commerce altogether, we prohibit theirs in like manner. So far, then, as foreign commerce is regulated by treaty, Congress, as a branch of the government, has no voice in it, but only the president and senate. At the same time, the states, out of abundant caution, are expressly prohibited from entering into "any treaty, alliance, or confederation." But when the terms of commercial intercourse have thus been adjusted by treaty, it then remains to carry them into effect by legislative provisions.

Commercial legislation.^(b) I have already said that only a very small portion of commercial law, as before defined, has resulted from legislative enactment. The great mass of it is common to all nations, and embodies the wisdom of all times. The commercial legislation of Congress, therefore, can be briefly described. It differs very little from that of Great Britain. All our

(a) 2 Hall's Law Jour. 255.

(b) See Abbot on Shipping, with notes by Judge Story.

regulations have for their main object the encouragement of commercial enterprize among our own citizens, so far as this can be done without discouraging domestic production; and this encouragement is chiefly given through the exercise of the revenue power. For this purpose, Congress declares from time to time what places shall be *ports of entry and clearance*, and prohibits the importing into, or exporting from any other ports. These ports are placed under the immediate supervision of *custom house officers*, the chief of whom is styled *collector*, and acts under the general supervision of the treasury department. No ship engaged in foreign commerce can enter or depart from any port, until the custom house regulations have been complied with, and a permit obtained from the collector as evidence thereof. Among other things, a sworn *manifest*, containing a full statement of the entire cargo imported or exported, must be furnished to the collector; and thus complete statistics of our foreign commerce are at all times attainable. And to carry out the design before mentioned, of encouraging native enterprize, a discrimination is made between native and foreign ships, with respect to *duties*. Native ships are declared to include only those which are built here, or lawfully captured from an enemy, and which are wholly owned and officered by our own citizens. To obtain the privileges secured to such ships, they are required to be *registered* with the collector of the port to which they belong. The register contains, among other things, an accurate measurement and description of the ship, together with the names of the master and owners; and thus the whole amount of our tonnage engaged in foreign trade may be at all times known. A native ship not registered is treated as a foreign ship, and this is generally a sufficient motive to secure compliance with the registry act. Upon registering the ship, the collector makes out a *certificate* of registry for the use of such ship, and takes security from the owner that it shall be used for that ship only. Upon every change of ownership or burthen, a new certificate must be obtained; and upon every change of master, that fact must be reported to the collector, and be by him indorsed on the certificate. Every sale or transfer of a registered ship is required to be evidenced by a written *bill of sale*, reciting at length the certificate of registry, on peril of losing native privileges; though the transfer would be valid without such recital. Thus by reference to the collector's office, the title of every native ship is easily traced, and the responsibility of the owners to the public and to individuals conveniently secured. If a ship not built here or obtained by capture, be wholly owned and commanded by our citizens, she is entitled to protection as American property, though not regarded as a native ship with respect to duties. The only effect, then, of the certificate of registry is to secure American privileges; for not belonging to the law of nations, it is no voucher of national character. The document

designed for this purpose is commonly called a *sea letter*, though sometimes a *passport*; and it is essential to protect neutral ships in time of war. Another document, sometimes provided for by treaties, and here by act of Congress, is the *crew list*, which is essential for the protection of the crew in time of war. There is also a *certificate of property*, relating only to the cargo, which exists by the usage of the custom house, without being specially provided for. Every seaman, for his own security, is entitled to a *certificate of citizenship*, upon satisfying the collector that he is a citizen. To secure the well being of *passengers*, the number is not permitted to exceed two for every five tons of burthen, and their names must appear in the *manifest*. There must be a *medicine chest* amply supplied with medicines and directions; and a minimum quantity of *provisions* for each person on board. To provide a fund for the relief of sick or disabled seamen, every seaman is obliged to contribute twenty cents per month out of his wages, for which the master must account to the collector. To protect seamen from imposition, their contract for service is required to be in writing, and they have a lien on the ship to secure their wages. Finally, to protect them from ill usage abroad, it is unlawful to set them ashore in a foreign country against their consent; and if left there, it is the duty of our consuls to send them home at the public expense. There are numerous other regulations, for the health, protection, and comfort of seamen, which I have not time to describe. They all proceed upon the ground, that seamen are a reckless and improvident class of men, necessarily subjected to severe discipline, and requiring the most efficient safeguards against abuse and imposition.

Commerce among the states. (a) It is obvious that if *internal commerce*, which, from our varieties of soil and climate, must be immense between the different states, had been left to the regulation of the states themselves, a wide door would have been thrown open for internal dissensions. In a word, the states would have thus far remained foreign to each other. It was wise, therefore, to give the power to Congress exclusively. And in pursuance of this power, a system of regulations has been provided for vessels engaged in the *coasting trade* and *fisheries*, similar to those provided for vessels engaged in foreign commerce. If such vessels be over twenty tons burthen, they must be *enrolled* with the collector of the district, who issues a *certificate of enrolment*. The rules and requisites of enrolment are in all respects the same as of registry. If under twenty tons, no enrolment is necessary. But in either case a *license* must be taken out for the coasting trade or fishing. Otherwise, such vessels must pay foreign duties, if in ballast or laden with native products; and are liable to forfeiture,

(a) See 1 Kent, 431; 2 Story Const. 503—543; U. S. v. brig William, 2 Hall's Law Jour. 255; Brown v. Maryland, 12 Wheaton, 419; Gibbons v. Ogden, 9 Wheaton, 1; Raguet v. Wade, 4 Ohio, 107; Perry v. Torrence, 8 Ohio, 521.

if laden with foreign products. If vessels thus enrolled and licensed, would make a foreign voyage, the enrolment and license must be surrendered, and a registry taken out, and *vice versa*. These provisions for registry and enrolment, of course include *steamboats* as well as other vessels, and the navigation of our rivers and lakes, as well as of the ocean. And it will be seen that they enable government at any time to determine the exact amount of American shipping; as well as the portions of it respectively employed in foreign and domestic commerce. At the same time, they enable all persons concerned to trace readily the title to ships, by referring to the custom house books. The most important judicial construction upon this part of the clause, was occasioned by certain laws of New York, granting to individuals the exclusive privilege of navigating by steamboats all the waters within her jurisdiction. In the case of *Gibbons v. Ogden*, (a)

(a) In *Gibbons v. Ogden*, 9 Wheaton, 1, the facts were these. The state of New York had passed several laws, granting to Livingston and Fulton the exclusive privilege of navigating all the waters within the jurisdiction of New York, by steamboats. These laws had been decided in the state courts to be constitutional. *Livingston v. Van Ingen*, 9 Johns. 507; *Ogden v. Gibbons*, 4 Johns. Ch. R. 150, and 17 Johns. 488. But on referring the question to the supreme court of the U. S., they were decided to be unconstitutional, so far as they prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating the waters of New York by means of fire or steam. Chief Justice Marshall, who delivered the opinion, laid down the doctrine that the constitution was not to be construed narrowly, but liberally. The power to regulate commerce, was a power to regulate navigation. Otherwise Congress had no power over navigation. Again, the power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several states. It does not stop at the external boundary of a state, although it does not extend to a commerce which is completely internal. Congress cannot regulate the commerce which is only carried on between man and man in a state, or between different parts of the same state; but it can always regulate that commerce which concerns more states than one. The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation is connected with commerce either with foreign nations, or among the several states, or with the Indian tribes. And the power to regulate commerce is the power to prescribe the rules by which commerce is to be governed. It is a power complete in itself, and has no other limitations than those which are prescribed in the constitution. Nor is it one of the concurrent powers, like that of taxation. It is vested exclusively in Congress, and no part of it can be exercised by a state. A state may pass inspection laws, health laws, laws regulating internal traffic, and laws relating to turnpikes, ferries, and the like; but this is not an exercise of the power to regulate commerce, such being merely police regulations. But even admitting the states to have a concurrent power with Congress, still it is a settled doctrine that the laws of a state, which would otherwise be valid, must yield when they come into collision with the laws of Congress, the latter being supreme. And this is the case with the laws of New York now in question. They come into direct collision with the laws of Congress, regulating the coasting trade, which are the supreme law of the land, and must prevail over those which are subordinate. These laws expressly grant to vessels a license to carry on the coasting trade. Now a license to do a particular thing is a permission or authority to do that thing. The steamboats in question, being licensed under these laws, had permission from the United States to carry on the coasting trade any where, between Elizabethtown and New York, as well as other places. The laws of New York interfere with this permission, by granting the exclusive privilege of steam navigation to other boats. And so far as they thus come in conflict, they are void.

these laws, after being sustained in the state courts, were decided, by the supreme federal court, to be unconstitutional. It was held that commerce among the states, does not stop at their external boundaries, but penetrates beyond. It does not include traffic between man and man, or between different portions of the same state; but it does include that which concerns more states than one. The states may pass inspection laws, health laws, and laws relating to roads, ferries, turnpikes, canals, and the like; for these, though they facilitate commerce, are not commercial regulations. But they cannot interfere with the power of Congress to regulate the coasting trade, even within their own navigable waters.

Commerce with the Indians.(a) Under this head, I shall consider our Indian relations generally. We have already seen that the Europeans rested their title to this continent upon *discovery*. The Indians, however, then in possession, were admitted to have a certain *right of occupancy or use* in their lands, subject to the ultimate dominion of the discoverers. And this doctrine has ever prevailed in this country. We hold that the Indians have a kind of nondescript title, which can only be extinguished *by purchase*. The purchase is regulated by treaty; prior to which, the Indians are entitled to be protected in their possession. But the *fee simple* in the soil, and the right of *pre-emption*, belong to the federal government. The Indians can sell neither to the states, nor to individuals. And this principle is now extended to all their commerce, traffic, and intercourse; which are wholly under the control of the federal government. And this is without any reference to their location; since it makes no difference whether they are situated within particular states, or without the territorial limits of the Union. So that in fact, the Indian tribes are domestic and dependent nations, sustaining towards the federal government a relation analogous to that of a ward to his guardian, and thence denominated a state of *pupilage*. They are not foreign nations, in the sense in which these words are used in the constitution; but are, nevertheless, distinct political societies,

For the laws of Congress as much include vessels which carry passengers, as those which carry merchandize; and as much vessels propelled by steam, as those propelled by wind. Similar doctrines have since been held in the cases of *Brown v. Maryland*, 12 Wheat. 419; *New York v. Milne*, 11 Peters, 102; *Raguet v. Wade*, 4 Ohio, 107; *Perry v. Torrence*, 8 Ohio, 521. Under this clause, the question has been raised, whether Congress has the power to regulate the slave trade between the states. But as I shall have occasion to advert to this subject again, I will merely remark, that the words are broad enough to include this, provided slaves be regarded as property. Another important question is, whether Congress may not legislate upon some, if not all, of the subjects of commercial law, before mentioned, so as to produce a general uniformity throughout the Union. Why, for instance, might not the law relating to insurance, and to negotiable paper, be made the same in all the states?

(a) See the 50th lecture of Kent; 1 Story Const. 7, 136; 2 Story Const. 539; *Johnson v. McIntosh*, 8 Wheaton, 543; *Cherokee Nation v. Georgia*, 5 Peters, 1; *Worcester v. Georgia*, 6 Peters, 515.

capable of governing themselves, and of being parties to treaties. In short, they are neither wholly separated from us, nor yet a part of us. They are neither citizens, nor aliens; but sustain an anomalous relation, somewhere between the two.

Our relations with the various tribes have been regulated by numerous treaties and acts of Congress: but the following points are all I have room to refer to. The *Indian bureau* is a subdivision of the war department, which has the general superintendence of Indian affairs, through the instrumentality of *agents*, stationed at convenient points. When land has been secured to the Indians by treaty, no person is permitted to reside among them, or traffic with them, without a *license*. If a crime be there committed by a white person, it is punished. Intruders among them may be apprehended by the military force. Even hunting on their grounds is prohibited. Licenses are only granted to citizens of the United States, and they are required to give security for the observance of the laws. In all trials where an Indian is a party, the burthen of proof is made to rest on the white person. Foreigners are liable to be punished for being even found within their limits. The president is authorized to furnish them with domestic animals and implements of husbandry; to take measures for preventing the sale of spirituous liquors among them; and to appoint proper persons to instruct them in the arts and ways of civilization. But thus far, all has been to little purpose; and philanthropy finds in the past, little reason to hope for the future. The Indian seems to deteriorate by contact with the whites. His proper home is the forest. The tribes are gradually receding westward, before the tide of civilization, which is sweeping them away. And every thing portends that the time is not very distant, when the original possessors of the American soil, will live only in history.

§ 54. *Power as to naturalization.* (a) The words of the con-

(a) In 1790, Congress exercised this power. And the only question which has been raised on the subject, is, whether this power is exclusively vested in Congress? In *Collet v. Collet*, 2 Dallas, 294, the circuit court of Pennsylvania held that the states possess a concurrent authority; that the reason for investing Congress with this power, was to guard against too narrow, and not too liberal a mode of conferring the rights of citizenship; and therefore, while the states cannot exclude those citizens who have been adopted by the United States, they may adopt citizens upon easier terms than Congress does. But this doctrine is now given up. For, in *United States v. Villato*, 2 Dallas, 370, Judge Iredel said, if the case were new, he should be of opinion that the power of naturalization operated exclusively, as soon as it was exercised by Congress. In *Chirac v. Chirac*, 2 Wheaton, 269, chief justice Marshall held it as a point not to be controverted, that this power belongs exclusively to Congress. In *Golden v. Prince*, Judge Washington expressed the same opinion. And, in *Houston v. Moore*, 5 Wheaton 1, Judge Story mentioned this power as one which was exclusive, on the ground of there being a direct *incompatibility* in the exercise of it by the states. This is evidently a valid reason. For, if a state could make its own terms of citizenship, it might make terms for other states; since the moment an individual becomes a citizen of any one state, he becomes, by force of the constitutional provision, entitled to the privileges of a citizen in any other state. The power would thus operate extra-terri-

stitution are, "Congress shall have power to establish a uniform rule of naturalization throughout the United States." Prior to framing the constitution, this power was exercised by the respective states, without concert or uniformity, and great inconvenience and confusion were the inevitable result. The word "uniform," now makes this power exclusive in Congress. The states have no power over the subject of *citizenship*. To remove all doubt on this point, another provision declares, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Citizenship is thus made exclusively a national affair, without any reference to state power or limits. Who then are citizens of the United States? We know nothing of *denizens* in this country, and consequently all persons are divided primarily into *citizens* and *aliens*. Citizens are either *native* or *naturalized*; and aliens are either *friends* or *enemies*.

Native citizens, include, *first*, all persons born within the jurisdiction of the United States since our independence, or before that epoch, if they remained here afterwards; and *secondly*, the children of citizens born abroad, if their parents have at some time resided here.

Naturalized citizens, include, *first*, all persons who comply with the legal requisites for naturalization; *secondly*, their minor children, residing here at the time; and *thirdly*, the widow and minor children of persons complying with the preliminary requisites, but dying before their naturalization is consummated. The requisites of naturalization are prescribed by Congress in the acts of 1802, 1813, 1816, 1824, 1828, and are briefly as follows. 1. The applicant must be a free white adult. Colored persons cannot be naturalized. 2. The country of the applicant must be at peace with ours. 3. His intention to become naturalized, must have been declared under oath, before some federal or state court, or its clerk, two years before his admission, unless he has been a resident here since 1812; or unless he be a minor, having resided here three years before his majority, with the intention of becoming a citizen. 4. He must have resided five years within the country, and one year within the state where the application is made, behaving as a good citizen; which must be proved by other testimony than his own oath. 5. He must take an oath to support the constitution of the United States, and abjure all other allegiance. 6. If he has borne any title of nobility, he must renounce it. On these easy conditions the high privilege of American citizenship is offered to all our white brethren of the human family. The foreigner, however unaccustomed heretofore to institutions like ours, is, by this short process of naturalization, placed on the same

torially, if exercised by states, and this is a sufficient reason for conferring it exclusively on Congress; as is now generally admitted to have been the intention of the constitution.

footing with native citizens, with a few slight exceptions before mentioned, touching eligibility to office.

All persons not citizens, are aliens, with the exception of Indians and colored persons. When their country is at peace with ours, they are called *alien friends*; and when their country is at war with ours, *alien enemies*; and their condition is very different in the two cases. The great and primary duty of a citizen is *allegiance*. This is the tie which binds him to his government, under a transcendent obligation of fidelity. It is that peculiar relation which is violated by treason, a crime which none but citizens can commit. We have no other oath of allegiance than that which every officer and every naturalized citizen takes, to support the constitution. But the law regards the obligation as inherent, and existing prior to any oath. It is founded on that protection which government extends over its citizens. It implies something more than obedience to the laws, for this is the duty of every alien within our jurisdiction; the citizen is further bound never to take part against his government, but always to support and defend it. And this obligation of allegiance is held to be perpetual. No citizen can of his own will avoid it. Unless absolved from it by government, it goes with him wherever he goes, and makes him a traitor if he be found violating it. This is what is meant by the proposition, that no man can *expatriate* himself. However incompatible the obligations he may contract to other governments, this is paramount, and still continues. Such is the stern doctrine of the common law. No doubt it ought to be modified. How barbarous would it be for one of our naturalized citizens, who had spent his best days here, to be punished elsewhere as a traitor, for fighting on the side of his adopted country, in violation of a native, but long abjured allegiance to some other government! With regard to the distinctive privileges of citizenship, they are best described by stating the disabilities of aliens. Aliens, then, can neither vote, nor hold office, nor act as jurors. In many of the states they cannot hold real estate. But in Ohio, and in the new states generally, this disability is expressly removed, in order to encourage the settlement of the country. In regard to personal property, their legal capacities are the same every where as those of citizens, while they are friends. But in case of war, their condition is at once changed. The persons and property of alien enemies are at the mercy of government, which, by the law of nations, may detain the one, and confiscate the other. All trade and intercourse with them are illegal, and all contracts utterly void. The theory is, that a war between two nations is a war between all the individuals of these two nations; who are therefore to be regarded as personal enemies, and incapable of intercourse. This is abhorrent to all the good feelings of our nature. And fortunately, the evils which would result from the rigorous enforcement of so barbarous a doctrine, are greatly

mitigated by means of the power inherent in government, to grant *passports, safe conducts, and licenses*, to alien enemies, for the protection both of their persons and property. In fact, aliens, whether friends or enemies, have always been treated in this country with peculiar favor. Our vast public domain affords them a cheap freehold on their first arrival; and our easy terms of naturalization, enable them in five years to acquire the proud title of American citizens. The fear is, that in our eagerness to open an asylum to the oppressed of other climes, and to increase our population beyond all former example, we have been too liberal in the inducements held out to immigrants. It is indeed becoming a momentous question, whether more time should not be required to educate and prepare them for the high responsibilities of citizens of a free government. Yet when we reflect upon the fate of the celebrated alien law of 1798, we have little reason to hope for any change in this feature of our policy. This law merely authorized the president to order out of the country such aliens as he should consider dangerous to its peace and safety, under severe penalties for disobedience. And yet it was immediately cried down, and now forms a standing topic of opprobrium.

§ 55. *Power as to bankruptcy.*(a) The words are, "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States." This power is intimately connected with that of regulating commerce; for bankrupt laws most particularly affect merchants and traders; though they may be made to include all insolvent persons. The leading objects of a bankrupt law are four. *First*, to compel an equal distribution of the effects of the bankrupt among his creditors, without preference, in proportion to their claims; for which purpose, the law defines what shall be considered acts of bankruptcy; and from the moment of committing one of these acts, the power of the bankrupt over his property is at an end, and commissioners are appointed to take possession, and settle with the creditors. *Secondly*, to exempt not only the person of the bankrupt from imprisonment, but also his future acquisitions from liability for his then existing debts; for which purpose the creditors are compelled to take their respective proportions of his effects, in full discharge and satisfaction of their claims. *Thirdly*, to promote honesty; for which purpose, not only is the discharge made dependent upon the honesty of the bankrupt, but severe penalties are annexed to dishonesty. *Fourthly*, to encourage future efforts; for which purpose, if all is found to have been fair and honest, not only is the bankrupt released from future liability for past debts, but he is allowed a small sum out of the wreck of his fortune, with which to begin the world anew. Such are the general

(a) See *Mad. Pap.* 1481; 2 *Blackstone*, ch. 31; 3 *Story Const.* 4; 2 *Kent*, 389; and the 5th and 6th volumes of the *Law Reporter*.

features of a bankrupt law; and their humanity and equity would seem sufficient at once to commend them to every mind. The wonder is, that Congress should have so long slept over a power which might be so beneficially exerted. In 1800, a bankrupt law was enacted; but three years after, before a fair experiment could be made, it was repealed. Another bankrupt law, passed in 1841, shared a similar fate in a year after it took effect. The states, therefore, have been compelled to take the matter into their own hands; and several of them have enacted bankrupt laws. For some time, the constitutionality of these laws was doubted; but it was finally decided that the power is not vested exclusively in Congress. (a) If there be a bankrupt law of Congress in

(a) In *Sturges v. Crowninshield*, 4 Wheaton, 122, a note was made in New York to a citizen of Massachusetts, before the passing of a bankrupt law by the legislature of New York, the effect of which was to liberate both the person and property of the debtor from all future liability for prior debts. The maker of the note was sued in Massachusetts, and there pleaded his discharge under the law of New York. The circuit court were divided in opinion, and the case was certified to the supreme court. The question submitted was, whether the law of New York impaired the obligation of the contract, within the meaning of the prohibition? The court decided that it did. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is the obligation of his contract. Any law which releases this obligation in whole or in part, must, in the literal sense of the word, impair it. Such was the law of New York, for it gave an absolute discharge from all future liability. Parties, when they contract, have in view not only present property but future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are therefore liable for contracts, and to release them for ever from this liability, impairs their obligation. But insolvent laws, which merely release the person of the debtor from imprisonment, and not his after-acquired property from liability, would not impair the obligation of contracts. The court did not seem to rest their decision upon the important fact, that the note was made before the passing of the bankrupt law. They guarded their opinion by these words. "This opinion is confined to a case in which a creditor sues in a court, the proceedings of which, the legislature, whose act is pleaded, had not a right to control; and to a case where the creditor had not proceeded to execution against the body of his debtor, within the state whose law attempts to absolve a confined insolvent debtor from his obligation." In *Ogden v. Saunders*, 12 Wheaton, 213, the facts were these. The acceptor of a bill, at the time of accepting, resided in New York, and the payee in Kentucky. After accepting the bill, he removed to Louisiana, and was there sued on his acceptance. He pleaded his discharge under a bankrupt law of New York, which existed prior to his accepting the bill. This case, it will be seen, differs from *Sturges v. Crowninshield* in this, that the law was made before the contract; and from *McMillan v. McNeil*, 4 Wheaton, 209, in this, that the discharge was had under the law of the state where the contract was made. The court therefore were not bound by either of the foregoing decisions. The first question was, whether a state bankrupt law impaired the obligation of *posterior* contracts entered into in that state? And it was decided, four judges against three, that it did not. The ground they took was, that where a contract is entered into, after the passage of a law relating to it, between parties subject to that law, that law is incorporated into the contract, and becomes one of its terms. It cannot therefore be said to impair its obligation. The meaning of the prohibition must be understood, as if the words had been, no state shall pass any law impairing the obligation of *prior* contracts. The intention was, by this prohibition to guard against *retroactive* laws in relation to contracts, in the same manner as by another, to guard against *retroactive* laws in relation to crimes. Accordingly, *statutes of usury*, which affect the *validity* of contracts; *statutes of frauds*, which affect the *evidence* of contracts; and

operation, the states cannot contravene its provisions. But until this be the case, they may pass bankrupt laws, provided they do not violate another constitutional provision, which prohibits them from "impairing the obligation of contracts." In relation to this provision, the decisions amount to this; that between citizens of the state where the law is made, it is valid as to posterior contracts, and invalid as to prior; but with respect to citizens of other states, it is invalid as to all contracts. It is obvious, therefore, that no consent among the states, if that were practicable, can supply the want of a general bankrupt law for the whole Union. In this state, no movement has ever been made towards a bankrupt law. There is a provision in our bill of rights, declaring that "the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law." This merely opposes the barbarous doctrine of imprisonment for debt; against which public sentiment is so strongly inclining every where. And in pursuance of this declaration we have "an act for the relief of insolvent debtors," by taking the benefit of which, any insolvent person may secure himself against imprisonment for any debt then existing. The condition of this exemption is, that he make an honest assignment of all his property for the benefit of his creditors. We also have another law, which in a measure abolishes the preference of one creditor to another by an assignment of property in contemplation of insolvency, by declaring that such assignment shall enure to the general benefit of all the creditors. This is the nearest approach we have made towards a state bankrupt law.

§ 56. *Power as to the currency.* (a) Congress has power "to

statutes of limitation and bankruptcy, which affect the remedy on contracts, would all be constitutional as to posterior contracts, and unconstitutional as to prior. The other question raised was, whether the discharge of a debtor under a state bankrupt law would be valid against a creditor belonging to another state, who has never voluntarily submitted himself to the laws of that state, otherwise than by the origin of his contract? In the present case the payee of the bill, as well as the drawer, were citizens of Kentucky. And the court decided that a discharge under a state law would not discharge a debt due to a citizen of another state. The purport of the whole adjudication on both points, the court stated in the following words: "As between citizens of the same state, a discharge of a bankrupt by the laws of that state, is valid as it affects *posterior contracts*; but as against creditors, who are citizens of other states, it is invalid as to *all contracts*." Five years before this decision was made, our supreme court came to the same conclusion, in the case of *Smith v. Parsons*, 1 Ohio, 236, where a most convincing opinion was pronounced by Judge Burnet. Still earlier, the supreme court of New York held the same doctrine in *Mather v. Bush*, 16 Johnson, 233. The only opposing authority I have found, is the case of *Blanchard v. Russell*, 13 Mass. 1. This is directly contradictory on the last point above taken, as to the residence of the creditor, all the material facts being precisely the same as in *Ogden v. Saunders*. But this case arose before the question was discussed in any of the cases before mentioned. On the first point, as to impairing obligations, the decision was the same as above.

(a) The provisions relating to coin occasioned no debate in the convention. Mad. Pap. 1343. But a proposition to authorize Congress to emit bills of credit, was rejected

coin money, and regulate the value thereof, and of foreign coin ;” also, “to provide for the punishment of counterfeiting the securities and current coin of the United States ;” and “no state shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts.” The force and importance of these provisions will be best understood, by first adverting to the nature and functions of the *currency or circulating medium*. In civilized life no individual produces exactly what he consumes. The division of labor, ever extending as society advances, makes a countless multitude contribute to the wants of each. But this is not done gratuitously. Each gives something in exchange for what he receives. Thus all the productions of human labor are incessantly passing from hand to hand, in an endless process of distribution. But how shall these changes be effected? Barter alone will not suffice. Occasionally I may have a commodity which you want, and you one which I want, so that we can make a direct exchange. But even in this case, we should want some known *measure of value* ; and in all other cases, we should also want a *medium of exchange*. In a word, society requires, for facilitating exchanges, some convenient thing of universal notoriety, which every one will take for what he has to sell, both as measuring its value and paying for it. Such are the properties of what we call *money* ; which, by universal consent, has become the measure of value, and the medium of exchange in all the transactions of life. And what substance possesses the properties requisite for money in the highest degree? The voice of ages has decided in favor of the precious metals, *gold* and *silver*. *First*, because a great value can be comprised in a small bulk, which is not the case with baser metals. *Secondly*, because they waste very little with using ; it having been computed that gold in circulation does not lose more than one hundredth in twenty-five years, and silver about half that amount. *Thirdly*, because they are little liable to fluctuation in value. Value is affected chiefly by the cost of production and the regularity of supply. Since the discovery of America, neither of these elements of value has perceptibly changed. The annual supply from all the known mines of Europe and America, is nearly the same in amount, and costs nearly the same labor, one year with another. And should this quantity hereafter be found to vary considerably, still the variation would bear so small a proportion to the entire amount of these metals now in existence, which is supposed to be about five thousand millions, that the fluctuation would be scarcely felt.

by a vote of 9 to 2. The reason assigned in debate, was a decided hostility to paper money—ib. 1343–6. The same sentiments were expressed upon the proposition to prohibit the states from emitting bills of credit, which was carried by a vote of 8 to 1—ib. 1442. On the whole, it seems quite clear that the convention intended to prohibit paper money in every shape. For an account of the coins current in this country, see American Almanack for 1835.

It is true, that of the gross amount just mentioned, only about two fifths is in the shape of money ; but this does not affect the question of value, because the value is changed little, if any, by converting these metals from *bullion* into money. This is done by a process called *coining*, which consists in giving to each piece an authoritative stamp, expressing its weight and fineness ; and thereby adapting it to pass currently from hand to hand, without the trouble of weighing and assaying, at each transfer.

Such being the nature and functions of money, we are prepared to understand the meaning of the provisions above quoted. The power, "*to coin money*," is given to Congress, and withheld from the states, in order to insure a *uniform currency* throughout the Union. This power involves that of "*regulating its value*." But in order to insure a *sound*, as well as uniform currency, it was further necessary, either to prohibit the circulation of "*foreign coins*" altogether, or else confer the further power of regulating their value. The former alternative would produce inconvenience, and the latter was adopted. The only danger would now arise from the "*counterfeiting*" of the coins thus provided for ; and accordingly power is given to prevent this by punishment. Thus, so far as *coins* are concerned, effectual means are provided for securing to the whole country, that greatest of commercial blessings, a sound and uniform currency. And in the exercise of this power, Congress, by the acts of 1792, 1795, and 1834, has created *mints*, with the appropriate officers, for the purpose of coining. When bullion is brought to the mint, of the standard value, it is coined for the owner free of expense ; but if below the standard value, he is required to pay the expense, which is called *seigniorage*. It will be remembered, that Congress is not restricted to gold and silver ; and therefore copper is used for such values as are too small to be conveniently measured by the other two. If to this we add the adoption of the *decimal scale*, commonly called *federal money*, by which the dollar is made the *unit* of value, and all the other denominations are found by multiplying or dividing by ten ; we have in theory a complete money system. But the practical difficulty has hitherto been, to adjust accurately the relative values of gold and silver. Up to 1834, they stood in the coins as fifteen to one. But at the same time, the market value of the two metals in bullion was nearly as fifteen and eight tenths to one. The consequence was, that gold could not be kept in circulation, being at once bought up and uncoined. By the act of 1834, the eagle was reduced from two hundred and forty-seven and a half grains of fine gold, to two hundred and thirty-two grains ; which makes a difference in actual value, of sixty-six and a half cents. Whether the true ratio is now attained, remains to be tested by experience. If not, one will be withdrawn from circulation as before.

The remaining provisions prohibit the states from "emitting

bills of credit," and from "making any thing but gold and silver coin a tender in payment of debts." In order to understand these prohibitions, we must glance at the nature and history of what is called *paper money*. Admitting that paper can in any way be made to supply the place of metallic money, or specie, the motives for making the substitution are three. *First*, specie has an intrinsic value, equal to its current value or nearly so; while paper has comparatively no intrinsic value at all. Hence, by substituting paper for specie, there would be a saving to the whole country of the interest on the amount of the circulating medium, which may be set down at one hundred and fifty millions of dollars. *Secondly*, paper money is much more portable than specie; that is, more easily transferred from place to place. *Thirdly*, a paper currency is more elastic than specie; that is, more readily susceptible of contraction or expansion, to meet the occasions of a trading community, liable to sudden fluctuations; because the material can be had at any time, and in any quantity. The question then is, how can paper be made to pass for money? There are but two methods. In the first place, government may *compel* the people to take it as money. Despotic governments have often resorted to such high handed expedients. And when this course is adopted, it makes little difference whether the paper purports to be *redeemable* in specie or not; since its circulation is the result of compulsion. During our revolution, the states issued "*bills of credit*," known by the name of *continental money*, to an immense amount. These bills purported to be redeemable at some future time, by the states which issued them; but the general want of confidence soon made it necessary to bolster up their credit, by resolving, as Congress did, that whosoever should refuse to take these bills as money, "should be treated as an enemy to his country." The despotic power was wanting, however, to sustain this resolve; and there was a constant depreciation in the value of these bills, until they finally ceased to be worth any thing. It was to guard against the recurrence of such a state of things, that the states are now prohibited from "emitting bills of credit." And lest this prohibition might be evaded, by substituting something else equally worthless, in the place of specie, a further one was added, and designed to cover the whole ground. The states are prohibited from "making any thing but gold and silver coin" a legal tender; that is, from compelling the people to take any thing but specie as money. How then are we to account for the fact, that so small a part of our circulating medium consists of specie? To explain this, we must advert to the other method of making paper pass for money. This does not depend upon compulsion. There is no attempt to force a value upon that which has no value. Our paper currency consists of *promises to pay specie on demand*, which we call *notes* or *bills*. Their credit depends solely upon public confidence in the ability of the pro-

misers to redeem them whenever called on so to do. No one is compelled to receive them as money; but while all believe they will at any moment command specie, they circulate as freely as specie. How then is this general confidence sustained? If those who issue these bills are required to keep in reserve an equal amount of specie, in order to redeem them, dollar for dollar, at the shortest notice, there is no profit in the operation. And if not, whence the confidence in their immediate redeemability? The answer is, that the whole paper scheme is founded on the presumption that the holders of these bills will not generally ask for specie at the same time; and therefore the amount of specie kept in reserve, bears but a small proportion to the notes in circulation. And this is the great evil of the system. A general and simultaneous demand for specie cannot possibly be met, and disaster must follow. To enforce a universal performance of these promises, is to insure their being broken. Every sudden panic, therefore, must produce wide spread calamity.

But let us inquire who make these promises or issue these bills? It cannot be the states directly, for they are expressly prohibited from issuing "bills of credit." If the United States possess the power, they have not exercised it, except in the case of treasury notes. And in most of the states, as in Ohio, private individuals are prohibited, from motives of public policy. Whence then does this paper issue? The answer is, from incorporated companies, under the name of *banks*. Their charter enables a large number of persons to unite their means, and thus do conjointly and conveniently, what neither of them could do alone. The question then arises, can the states constitutionally incorporate banks, with power to emit these bills of credit? Were this a new question, I should not hesitate to say that the states cannot do indirectly what they are prohibited from doing directly. They cannot confer a power which they do not possess. No one can read the provisions before quoted, in connexion with the antecedent history, without being convinced that the federal constitution intended to prevent the states from supplying, in any way, the currency of the country. For we are thus exposed to precisely the same evils, as if these bills were issued directly by the states, and against which the prohibitions were designed to secure us. But as state banks have been in existence from a period prior to the formation of the federal constitution, it is now too late to question their constitutionality. (a) And the same may be said of the power of Congress to incorporate a national bank. It has been too long acquiesced in to be called in question now. As an original question, however, it is much less doubtful than the other, as will be shown hereafter, when we come to speak of incidental powers. Still there are

(a) See on this subject the cases of *Craig v. Missouri*, 4 Peters, 410, and *Briscoe v. the Bank of Kentucky*, 11 Peters, 257, where state banks, founded upon actual capital, and not upon state credit, are held to be constitutional.

many persons, who hold with much plausibility, that it was the intention of the framers of the federal constitution to exclude paper money altogether; and confine the circulating medium to the metallic money coined and regulated by Congress. The provisions we have been discussing, certainly look that way. And though it may now be too late to return to such a state of things, yet a consideration of all the evils incident to our paper system, compared with its advantages, almost inclines one to wish it had never been introduced.

The principal functions of banks are the three following. *First*, they receive money on deposit for safe keeping, with the privilege of using it until called for; which money is drawn out as the depositor wants it, by means of *checks*, or brief orders to pay the bearer. *Secondly*, they loan money at interest, by discounting the notes and bills of their customers; for which purpose they avail themselves of the average amount of the deposits, in addition to their actual capital. *Thirdly*, in performing these operations, they issue their own notes, instead of specie, whenever their customers will take them. From the combination of these three operations, they are called banks of *deposit*, *discount*, and *circulation*; and such are the curious and complicated engines, which supply a large part of our circulating medium. Each bank is under the management of a board of directors, elected by the stockholders, and sharing a divided responsibility. Their proceedings may be conducted in profound secrecy, since the public at large have no power of inspection. They are under a constant temptation to extend their issues beyond their means of redemption, because these reserved means, consisting of specie in their vaults, constitute their only unproductive capital. They rely, as we have seen, upon the general forbearance of their creditors, whether depositors or note holders, to demand specie, except on special occasions; which demand, if made at the same time by all creditors upon all the banks, must inevitably produce universal bankruptcy; because the effect of the system is, not to keep specie enough in the country to redeem one dollar in ten of the paper. If, therefore, any thing happens to disturb the general confidence upon which alone this forbearance depends, and create a panic, the consequence even to prudent banks, is temporary embarrassment; and to imprudent banks, ultimate insolvency.

§ 57. *Power as to weights and measures.* (a) The words are, "to fix the standard of weights and measures." The design of conferring this power on Congress was, that weights and measures might be uniform throughout the United States. But although the subject has been pressed upon the attention of Congress by elaborate reports, nothing has ever yet been done. And the common understanding is, that until Congress shall fix a

(a) See 1 Black. 226; 3 Story Const. 20.

general standard for the states, each state is at liberty to fix one for itself. (a) Any thing like uniformity, therefore, must be the result of accident. In Ohio an act was passed in 1811, to regulate measures; but there was nothing on the subject of weights until 1835, when an act was passed regulating both weights and measures. This act adopts the standard of New York. The great desideratum has been to find some standard which would never vary, and if lost, could be replaced. Such a standard would be perfect; and vast sums have been expended by the governments of Europe in experiments to attain it. Perhaps, however, ours is as nearly perfect as need be desired. The *standard of measure* is a *yard*, as used in New York on the fourth of July 1776; the length of which bears to the length of a pendulum vibrating seconds, at Columbia college, in a vacuum, at the temperature of melting ice, the proportion of one million to one million eighty-six thousand one hundred and forty-one. If therefore perfectly accurate experiments could be made, the constancy of this standard would be equal to the constancy of gravitation; and if lost, such experiments could replace it. The act then declares that "the standard thus defined, shall be measured in a straight line between two points, engraved upon golden disks, inverted into a straight brass rod;" and this is to serve as an original standard of measure, from which all other denominations of length, surface, and solidity, are obtained by multiplication or division. The *standard of weight* is a *pound*, of such magnitude that the weight of a cubic foot of distilled water, at its maximum density, weighed in a vacuum with brass weights, shall be equal to sixty-two and a half such pounds. Thus the standard of weight is dependent upon that of measure. A standard pound is to be made of brass, according to this estimate, and to serve as an original standard of weight, from which all other denominations may be derived. The *standard of capacity* is a *gallon*, of which there are two kinds; one for *liquid measure*, the other for *dry measure*. The *liquid gallon* contains eight pounds of distilled water at its maximum density, at the mean pressure of the atmosphere, on the level of the sea; and the *dry gallon*, ten pounds of the same. Thus the standard of capacity depends upon the standard of weight, as that does upon the standard of measure. An original standard gallon of each kind is to be made of brass, from which all other denominations are derived as before. There are divers other specifications for which I have not room. The act requires the secretary of state, who is made the state sealer of weights and measures, to procure original standards, as above defined, and keep them in a chest in his office. He is to furnish the auditor of each county, who

(a) Query, how else can there be provision made for punishing the use of false weights and measures?

is made the county sealer, with copies of these originals. And thus every citizen has a convenient means of procuring accurate weights and measures. To insure conformity, it is made penal to use any other weights and measures than those thus defined.

§ 58. *Power as to crimes and punishment.* (a) As a general principle, the power of punishment is reserved to the states, as belonging properly to their internal police; and the cases in which Congress possesses this power, may be considered as exceptions created by necessity. In some of these cases the power is expressly conferred, and in others it is incidental. I shall here confine myself to the former. Congress has the express power of punishment in the five following cases. 1. "To punish counterfeiting the securities and current coin of the United States;" which has been already considered. 2. "To define and punish piracies and felonies committed on the high seas." Without inquiring minutely into the meaning of these terms, it is sufficient here to say that they include all the offences on the high seas, which require punishment; and their locality points out Congress as the proper power to provide for their punishment. 3. "To define and punish offences against the law of nations." Without specifying what these offences are, it is sufficient here to say that their nature makes them the proper subject of national cognizance. 4. "To declare the punishment of treason." (b) In the preceding cases, the power was to *define*, as well as punish. But treason being the highest of all crimes, is, for the security of the people, defined in the constitution itself. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." This language would seem to indicate that there may be treason *against a state*; and the same inference may be drawn from the provision respecting fugitives from justice, to be described hereafter, which speaks of treason as a crime of which a state may have jurisdiction. Accordingly several of the states provide for punishing treason against themselves. This was the case in Ohio, until 1824. But the point has never been definitely settled, and is one of no small difficulty. Without some other definition, however, it is not easy to imagine a case of treason against a state, which would not also be treason against the United States. But however this may be, it is manifestly proper that treason against the United States should be punished by the United States. There is however a limitation to this power. "No attainder of treason shall work corruption of blood, or forfeiture, beyond the life of the person attainted." Of this limitation, it is only necessary to say, that as Congress has made death

(a) See 3 Story Const. 52, 169; 1 Swift's Dig. 264; Mad. Pap. 1347-9, 1575.

(b) Mad. Pap. 1371-7. Ex parte Bollman, 4 Cranch, 75; Burr's case, 4 Cranch, 470. Story's Charge, 1 Story's Rep. 614.

the punishment, there is no corruption of blood or forfeiture at all. There is still another provision relating to the evidence of treason. "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." The peculiar anxiety thus manifested, on the subject of treason, is justified by the history of England, where treason has been made a most terrific engine in the hands of arbitrary power. 5. To punish all offences committed within the District of Columbia, and other places over which Congress exercises exclusive legislation. These places will be specified hereafter. The federal constitution contains but one other provision relating to crimes and punishments, which is, "that the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places, as the Congress may by law have directed." But all these provisions will be discussed more at large hereafter, when we come to the subject of criminal law. The incidental power of punishment will also be considered in its place.

§ 59. *Power as to post offices and post roads.*(a) The words are, "To establish post offices and post roads." The propriety of vesting this power in Congress, results from the consideration, that the states could not have made the system what it is, because neither could legislate beyond its own limits. At best, therefore, an arrangement of this kind, consisting of twenty-six distinct parts, must have been confused and disjointed. Whether all power relating to the subject is taken from the states, or not, is a question not decided, and of no great importance; since the grand benefits of the establishment must always be the fruits of federal legislation. If the states can do any thing, it is only in subordination thereto. But what is implied in the power to "establish post offices and post roads?" Some have held that these words only authorize Congress to direct where post offices shall be kept, and on what roads the mail shall be carried; and not to construct either buildings or roads for the purpose. But this construction involves the solecism of requiring Congress to effect an end, without the power of using the proper means; and in practice a much more liberal construction has been given to these words. Congress has derived from this brief clause, power to create the post office department before mentioned; to make provision for transporting the mail from every point of the Union to every other point; and to secure its safety and dispatch by adequate penalties for every obstruction or depredation. To particularize these very numerous provisions, does not fall within my purpose. But no language would be too strong to describe the blessing

we enjoy in this certain and rapid means of receiving and communicating intelligence. Hitherto the rates of postage have been such, that the post office department has supported itself. But every one feels that, were this not the case, the public money could not be better expended, than for this universal public accommodation.

§ 60. *Power as to copy rights and patent rights.* (a) The words are, "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." These words include "*authors*" and "*inventors*" only, and not introducers. The right intended to be secured to authors is called *copy right*, and to inventors, *patent right*. The propriety of vesting this power in Congress, results from the consideration that the states could not exercise it efficiently. A copy or patent right confined to a single state, would afford but little encouragement to intellectual efforts; whereas, the declared object of the power is, "to promote the progress of science and useful arts." Whether there be left to the states a concurrent power, to be exercised in subordination to the legislation of Congress, has never been decided. It is clear, however, that they are not precluded from encouraging the introduction of new works and inventions. It will be observed, that Congress is no farther restricted, as to the time for which these rights may be secured, than that they must be "for limited times," and not perpetual. Congress, therefore, might make them any thing short of perpetual; and why even this limitation was inserted, is not very apparent; for it would seem that on the principles of natural justice, the results of intellectual labor ought to be as much the subject of perpetual ownership, as the results of any other labor; and with respect to copy right, this was the ancient doctrine of the English law. But as the remedies for violations of this right were not deemed sufficient, Parliament passed an act in 1709, during the reign of Queen Anne, for the purpose of rendering copy rights more secure and available, during the first fourteen years; and for another equal period, if the author should be living at the end of the first. It does not seem to have occurred to the framers of this law, that it would be construed as superseding the common law, in regard to the duration of the right; but in 1774, after much controversy, it was finally decided that this act did have the effect of narrowing down a right, till then perpetual, to the short period therein designated. A subsequent act of Parliament, in 1814, extended the time to twenty-eight years, with the right of renewal. It will hereafter be seen, that on the subject of copy rights, we have but followed the lead of England; and the same is substantially true with

(a) See 2 Blackstone, 405; 2 Kent, 298, 315; 3 Story Const. 48; 10 Amer. Jur. 63; Maugham on Literary Property; Nicklin on Copy Right; Phillips on Patents; Godson on Patents; Webster on Patents.

respect to patent rights. These were not known at common law, but originated in England, in an exception made for fourteen years, in favor of certain manufactures, in the general act for the prevention of monopolies. We have adopted the same period, but the right extends to other subjects than manufactures. In one respect, however, the English law is more liberal than ours. It does not confine the privilege, either of copy or patent rights, to citizens or residents, as is the case here with respect to copy rights. And ought we, in this solitary instance to be outdone in liberality towards foreigners? The question is worthy of serious consideration. On the whole, it may well be doubted whether we have much to boast of, on the score of legislative encouragement of intellectual enterprise. By securing to authors and inventors, such a property in their own productions, as would descend to their posterity, if not perpetually, at least for some generations, it is very certain that the encouragement would be much greater than it now is. And would it be attended with any general evil? If not, natural justice would seem to dictate that intellectual labor should be placed on the same footing with all other labor. In Germany, Norway, and Sweden, where the right is perpetual, no evil is experienced. In France and Russia, it extends twenty years beyond the author's lifetime. This is better than with us; and yet the public experience no evil. Indeed, the only effect to be feared, would be exorbitancy of price; but this, as in all other cases, might be safely left to the interest of those concerned. With these general remarks, I proceed to give an outline of the law of copy rights, and patent rights, beginning with the former.

Legislation of Congress respecting copy rights. The first act on the subject, was passed in 1790. Amendatory acts were passed in 1802 and 1819. All these were consolidated and superseded by the act of 1831, which, together with an amendatory act of 1834, constitutes our present law; an abstract of which will be given under several distinct heads.

In what copy right consists. Copy right means something very different from property in an unpublished manuscript which stands on the same footing with any other ownership. In fact, copy right begins where property in the manuscript ends. Without publication, the manuscript would be of little value; and without copy right, publication would be an abandonment of the manuscript for all valuable purposes; since copies accessible to all would then be as available for future publication as the original. Copy right, then, is the exclusive right of multiplying copies, and enjoying the avails thereof. Its chief value, considered as property, depends upon its being exclusive. Let competition be permitted after the first publication, and copy right would become a mere name. Copy right, therefore, is an exclusive right, so long as it continues, and on the common principles of ownership, it would seem to be perpetual. In England, as we have seen, it was in fact so regarded, as a matter of common law, until

the construction given to the statute of Anne. (*a*) In this country it remained an open question, whether there was or was not a copy right at common law, independently of the legislation of Congress, until the case of *Wheaton v. Peters*, (*b*) when a majority of the supreme court of the United States, upon full argument and consideration, decided, that there is no copy right at common law in this country. For the right and remedy, therefore, we are to look solely to the acts of Congress. And there, copy right is declared to be the sole right and liberty of "printing, re-printing, publishing, and vending." The right commences with the date of recording the title, and continues for twenty-eight years, with a qualified privilege of renewal for fourteen more.

What may be the subject of copy right. The subjects of copy right enumerated in the statutes, are, "books, maps, charts, musical compositions, prints, cuts, and engravings." These terms are broad enough to include almost every production of the press, though it would seem that newspapers, and perhaps some other periodicals, cannot become the subject of copy right.

Who may have copy right. The first qualification for obtaining a copy right, is, to be a "citizen of the United States, or resident therein." In this respect, as before observed, we are less liberal than other nations; and efforts have recently been made to procure an extension of the privilege to non-resident foreigners. On this subject, as a question of policy, there prevails a wide difference of opinion. But a more interesting inquiry to us, is, what kind of agency in a literary production constitutes an original or derivative title to copy right? The privilege is restricted by the statute to "those who shall be authors of any book, map, chart, or musical composition, or who shall invent, design, etch, engrave, work, or cause to be etched, engraved, or worked from their own design, any print, cut or engraving," and the executors, administrators, or legal assigns of such persons. Copy rights are thus made assignable either before or after being secured; and the assignment must be in writing, with two subscribing witnesses, in order to be legal; though in *Mauman v. Fegg*, (*c*) it was held that an equitable title will be protected in chancery. Moreover, in order to operate against a subsequent purchaser, without notice, the assignment must have all the requisites of a deed for the conveyance of land, and be recorded within sixty days with the clerk of the district court. It would seem, however, that the privilege of renewal is not assignable, being confined to the author, inventor, designer, or engraver if living, if not, to

(*a*) See the cases of *Miller v. Taylor*, 4 Burr. 2303; *Donaldson v. Becket*, 4 Burr. 2408; and *Beckford v. Hood*, 7 T. R. 620; in which the common law was held to be abrogated by that statute.

(*b*) 8 Peters, 591.

(*c*) 2 Russell, 285.

his widow or children; but after renewal, there seems to be nothing in the way of assignment. In case of death, copy right passes to the personal representatives, under the general law for the distribution of personalty. With respect, therefore, to derivative title, there is no difficulty, the statute being full and explicit. But great doubts must often arise with respect to original title. What shall amount to authorship is often a very difficult question. (a)

Preliminary conditions. (b) By the act now in force, the preliminary steps for procuring a copy right are as follows. 1. To deposit a printed copy of the title before publication, with the clerk of the district court, of the district in which the author or proprietor resides. 2. To give notice of having thus entered the work for copy right, by inserting the same together with the year and the name of the proprietor, on the title page or the page next following, of each copy of the book, or on the face or frontispiece of any other production. 3. To deposit a copy of the work with the aforesaid clerk, within three months after its publication. In case of renewal these three conditions must be performed within six months before the expiration of the first term; and within two months of the date of the renewal, a copy of the record thereof, must be published in one or more newspapers for four weeks.

(a) In *Wheaton v. Peters*, 8 Peters, 591, it was held that no reporter can have a copy right in the written opinions delivered by the court, though in the other matter proper for reports, he may. In *Southey v. Sherwood*, 2 Merivale, 434, it was intimated that there can be no copy right in a work of a scandalous or immoral character. In *Pope v. Curl*, 2 Atk. 342, it was held that the writer of letters, and not the receiver, is the legal owner, so far as relates to copy right, and the case of *Percival v. Phipps*, 2 V. & B. 19, is to the same effect. But the receiver will not be enjoined from publication, when necessary for his own protection or vindication. In *Wyatt v. Barnard*, 3 V. & B. 77, it was held that a translation is as much a subject of copy right, as an original composition. In *Cary v. Longman*, 1 East, 357, it was held that copy right may exist in part of a work, when the whole is not the subject of it; as when original notes, additions, or illustrations are affixed to an old work; and the case of *Cary v. Kearsly*, 4 Esp. 168, is to the same effect. It could not have been the intention of the statute to protect mere compilations from the works of others, when no additional labor is bestowed; for such a compiler is in no sense an author. Besides, he must either infringe the copy right of others, and thus forfeit all claim to protection; or he must avail himself of what is already common property, and incapable of appropriation. But if he makes additions and alterations, in them he has a copy right; and there is a recent case, *Gray v. Russell*, 2 Law Reporter, 294, in which it was held that a work might be the subject of copy right, although the materials which compose it may be found in the works of other authors, antecedently printed, provided the plan, the arrangement, and the combination of these materials be original. But this is carrying the doctrine farther than any preceding case.

(b) In *Beckford v. Hood*, 7 T. R. 620, it was held that the preliminary conditions in the English statute were not indispensable to vest the title. In *Nichols v. Ruggles*, 3 Day, 145, the same doctrine was held with respect to preliminary conditions in the acts of Congress; and the case of *Ewen v. Cox*, 4 Wash. C. C. R. 487, partially countenanced the same idea. But in *Wheaton v. Peters*, 8 Peters, 591, these conditions were held to be indispensable.

What constitutes an infringement of copy right. In general terms, when a copy right has been secured, any act which interferes with the exclusive right of multiplying copies, and enjoying the avails thereof, will be an infringement of such copy right. The spirit of the provision must have been designed, not only to secure the whole work from being published or sold, by any other person than the proprietor, but any part from being pirated. But we are not left to general inference. With respect to books, the act forbids every person but the proprietor, "to print, publish, or import, or, knowing the same to be so printed or imported, to publish, sell, or expose to sale." And with respect to the other subjects of copy right, "to engrave, etch, work, sell, or copy, either in the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law; or to print, or import for sale, or knowing the same to be so printed or imported, to publish, sell, or expose to sale, or in any manner dispose of." The act is silent with respect to parts of books, but expressly protects parts of the other productions named. Still the words must have a reasonable construction. (a) Ideas must be the common property of the whole world, and can never be exclusively appropriated. To some extent also literal quotations must be permitted.

Remedies. The remedies provided by the statute are prevention and redress. The circuit court of the United States has jurisdiction to grant injunctions to prevent the publication of manuscripts and the infringement of copy rights. Whether the state courts have this jurisdiction, has not been decided, but it is presumed that they have not. It is usual in a bill of injunction, to pray for an account of the copies sold; and though not expressly authorized, there is little doubt that in a proper case, the court would decree an account, as is the English practice. And if so, both prevention and redress may be had in equity. But when redress is the principal thing, it is generally sought for in the courts of law. And here the jurisdiction would seem to be concurrent in the federal and state courts. In England, the proper remedy is an action on the case for damages; and this is the

(a) In *Wilkins v. Aikin*, 17 Ves. 422, fair quotation is held permissible; but at the same time, it is held that one shall not, under this pretext, appropriate the whole, or any considerable portion of another's work. In like manner a fair abridgment was held, in *Giles v. Wilcox*, 2 Atk. 141, to be no infringement of copy right, but itself the subject of distinct copy right. The cases of *Roworth v. Wilkes*, 1 Camp. 94, and *Mau-man v. Fegg*, 2 Russ. 285, take the same general views with respect to quotation and abridgment, applying them particularly to reviews and encyclopedias. The result is, that in such cases the intention is chiefly to be considered. But even when the intention is good, if the effect be essentially injurious to the owner of the copy right, it will be held an infringement. In *Coleman v. Wathen*, 5 T. R. 245, it was held that the acting of a dramatic work upon the stage, was no infringement of copy right; and the case of *Murray v. Elliston*, 5 Barn. & Ald. 657, is to the same effect, though an injunction had previously been granted to prevent such acting. In England it would be held an infringement, to take down a lecture, or any other discourse in short hand, and publish it; but probably not in this country, because not within the words of the statute.

remedy prescribed by Congress for wrongfully publishing the manuscript of another. But for violating a copy right, no action for damages is given. The injured party can only proceed for the penalties inflicted by the statute. With respect to books, the penalty is forfeiture of every copy to the proprietor; and fifty cents for each sheet, one half to the proprietor, and the other half to the United States. With respect to the other subjects of copy right, the penalty is a forfeiture of the plates, as well as copies, and one dollar for each sheet, to be divided as before. These penalties are to be enforced by action of debt, to be commenced within two years; and it is provided that any special matter may be given in evidence under the general issue. There is a further penalty of one hundred dollars for falsely publishing on the title-page, that the copy right has been secured; but this is only to protect the public against imposition. When a part of the book is the subject of copy right, the injunction above provided for, can only reach that part, and if the rest can be published separately, it may be done without infringement. If not, the injunction will indirectly cover the whole. (a)

Legislation of Congress respecting patent rights.(b) The first act was passed in 1790, but was repealed by the act of 1793. Additional acts were passed in 1800, 1819, and 1832, all of which were repealed by the act of 1836, which, together with the amendatory act of 1837, constitutes our present law, an abstract of which will be given under several distinct heads.

The patent office. There is a patent office attached to the department of state, the chief officer of which is styled commissioner of patents. This officer and those subordinate to him are required to take an oath and give security for the faithful performance of their duty. All books, papers, models, and specimens connected with patents are kept in this office. It also has a library composed of such scientific books and publications as are adapted to its purposes. The office was destroyed by fire on the 15th of December, 1836, together with most of its contents; and one object of the act of 1837 was to provide, as far as possible, for replacing its records and models.

Who may obtain a patent. The words of the statute are, "any person having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or

(a) This is the doctrine held in *Mauman v. Fegg*, 2 Russ. 285, a case particularly valuable, for its view of the practice in questions of copy right. In England, the damages to be recovered in an action on the case, are easily graduated, according to the amount of matter which is pirated, but our statute makes no provision for the apportionment of penalties, when a part only is pirated. For this, and other reasons, the proceeding by injunction, with a prayer to account, is by far the most convenient and efficacious remedy; and thus far, there is no report of an action brought for the penalty.

(b) See Phillips on Patents; Godson on Patents; Webster on Patents; Peters' Digest of Decisions by the Federal Courts, title, Patents for Useful Inventions.

composition of matter, not known or used by others before his discovery and invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer." The term "*useful*" is here employed in contradistinction to mischievous; and if the invention will not be prejudicial to good morals or sound policy, the degree of utility, provided it be not absolutely frivolous, will not be drawn in question. The term "*new*" requires that the patentee should not only be the *original*, but the *first* inventor; and accordingly, if the invention had been previously described in some printed publication, though he in fact never saw or heard of it, his patent will not be good. But if he honestly believed himself to be the first inventor, the fact that the invention had been previously known or used in a foreign country, but not patented or published, will not invalidate the patent. And the invention must not have been in public use or on sale, with the assent of the inventor, at the time of his application for a patent, for this will be deemed a waiver of his right. But it is no objection that a patent has been previously obtained in a foreign country and publication made there, provided the application for a patent be made here within six months thereafter. Again, the patentee must either be the actual inventor or the bona fide proprietor of the invention; for if he surreptitiously appropriated the invention of another, who was using reasonable diligence to mature it, his patent will not avail him.

Preliminary conditions. The application for a patent is made to the commissioner in writing. It must be accompanied by a full and clear *description* of the invention, so as to identify and distinguish it from all others; and by *drawings, specimens, or models* sufficient for a complete illustration. The description and drawings must be signed by the inventor and attested by two witnesses. If the description be intentionally defective, either by containing too little, or too much, or being too vague, it will invalidate the patent. But if the error arise from inadvertency, it may be subsequently corrected. The applicant must also state under oath to what country he belongs, that he verily believes himself to be the original and first inventor, and that he does not know or believe that his invention was ever before known or used. The fee or duty to be paid varies as follows. If the applicant be a citizen, or an alien having resided here one year and made oath of his intention to become a citizen, it is thirty dollars; if he be a subject of Great Britain, five hundred dollars; if he be a subject of any other country, three hundred dollars. Provision is also made for the case where a citizen or such resident alien has not yet so matured his invention as to be ready to make his application. In this case, he may, on paying twenty dollars, file his *caveat* in the patent office, describing his invention as far as can then be done, which will entitle him for one year to

notice from the commissioner of any interfering application ; and if within three months from receiving such notice, he shall perfect his application, he will thus retain his priority. In the mean time, until the question be decided, his caveat and the description, by the interfering applicant are kept secret in the confidential archives of the office.

Form and effect of the patent. The patent is in the form of a certificate, signed by the secretary of state, and countersigned by the commissioner, under the seal of the office, setting forth that the patentee has complied with the requisitions of the law, and containing a short description or title of the invention sufficient to indicate its nature and design. For particulars, reference is made to the specifications given by the inventor, a copy of which is annexed to the patent. It then proceeds in express terms to grant to the patentee, his heirs, executors, administrators and assigns, the full and exclusive right of making, using, and vending to others to be used, the invention for which the patent is given, for the term of fourteen years, throughout the United States. If a person entitled to a patent die before obtaining it, his personal representatives may obtain it. The whole or any part of it, either for the whole country or any particular district, may be assigned by any instrument in writing ; but the assignment must be recorded, within three months, in the patent office ; and if made and recorded before the patent is obtained, it may be issued to the assignee. At the expiration of fourteen years, the patentee may obtain a renewal for seven years more, on the payment of forty dollars, provided a board consisting of the secretary of state, the commissioner of patents, and the solicitor of the treasury shall be of opinion that he has not been sufficiently remunerated by the profits of the first period.

Issuing of the patent. If the conditions before mentioned be complied with, and the commissioner perceive no objection, the patent is issued as a matter of course. But if the commissioner perceive objections, he notifies the applicant thereof ; and he may thereupon withdraw his application and receive back one third of his fee ; or he may obviate the objection if it can be done ; or he may have his claim investigated before a board of three examiners to be appointed by the secretary of state, on paying twenty-five dollars towards their fees. In case of interfering applications, the prior claim is determined in a similar manner ; and in either case, the decision of the board will govern the commissioner. But if any applicant be dissatisfied with such decision, he may have his claim determined by a proceeding in chancery. At the request of the applicant, the patent may take date from the time of making the application, provided it be not more than six months before the issuing of it. If the patentee be an alien, and shall neglect, for eighteen months from the date of the patent, to put and continue the same on sale to the public on reasonable terms, he

thereby forfeits the right. If, after the issuing of the patent, the description be found to be erroneous through inadvertency, either by containing too little, or by claiming some material part as new, which is not, the proprietor may have the defect cured by making the correction or filing a disclaimer, as the case may be, and paying fifteen dollars. If an improvement be made after taking out a patent, it may on like terms be added to such patent.

Remedies. Original jurisdiction, both in law and equity, of all controversies growing out of patent rights, is given to the circuit court, with an appellate jurisdiction to the supreme court, as in other cases. The remedies provided include both prevention and redress. By a bill of injunction, the proprietor may prevent a threatened infringement of his patent, or by an action on the case he may recover damages for any injury actually done; and in the latter case, it is in the power of the court to increase the verdict to any extent not exceeding treble the amount found by the jury. To avoid technical questions in presenting the defence in this action, it is provided that the defendant may plead the general issue, and give any special matter in evidence, by furnishing a written notice thereof thirty days before the trial.

The proprietor of a patent is required, under a penalty of one hundred dollars, to put the date of his patent upon every patented article sold. And if any person not having a patent, shall, without the consent of the proprietor, place upon any patented article the name, stamp, mark, or device of the patentee, or any imitation thereof; or shall place upon any unpatented article, any words, stamp, or device signifying that it is patented, with the intention of deceiving the public, the penalty for every such offence is one hundred dollars. (a)

§ 61. *Power as to defence.* There are several provisions relating to war, and to the organization of the army, navy, and militia, which I shall consider together, under this head.

1. Congress has power "to declare war." (b) In England this is the exclusive prerogative of the king. But here, this power was considered too momentous to be intrusted to a single hand. We allow the president, when war has been declared, to be commander-in-chief of the forces raised to carry it on; and we allow him, with the consent of the senate, to bring war to a

(a) The foregoing remarks apply to patent rights as they existed prior to the act of 1842. By that act, the privilege of obtaining a patent is extended to the invention of any new and original design for a manufacture, for the printing of cloth, and for stationary; and to any new and original impression, ornament, pattern, print, or picture, to be placed on any article of manufacture; and to any new and original shape or configuration of any article of manufacture. The duration of the patent in such case is seven years, and the fees one half those paid in other cases. The applicant, if not a citizen, must have resided here one year, and declared his intention of becoming a citizen.

(b) In the convention, some were in favor of vesting this power in the president alone, and others in the senate alone. *Mad. Pap.* 1351-3.

close by a treaty of peace. But to determine when the nation shall be involved in war, is wisely left in the hands of Congress alone. With such jealousy is this power guarded, that the constitution in another place declares, that "no state shall engage in war unless actually invaded, or in such imminent danger as will not admit of delay." And the propriety of this qualified prohibition to the states is obvious. If a state be actually invaded, or in imminent danger, it must necessarily have the right of self-defence; but if a state could be the aggressor by declaring war, it would be in the power of a small minority to embroil the whole Union.

2. "To grant letters of marque and reprisal." At the same time the states are expressly prohibited. Letters of marque and reprisal are one and the same thing. They are grantable by the law of nations, whenever the subjects of one state have been injured by those of another, and they authorize the former to seize upon the persons and property of the latter, by way of satisfaction for the injury. They may, therefore, serve sometimes to prevent war, but the grant of them is usually a preliminary to the declaration of war; and it is supposed that the power to grant them, would have been included in the power to declare war, without an express provision. The propriety of prohibiting the states, rests on the same foundation as the other.

3. "To make rules concerning captures on land and water." There is no doubt that this power would have been included in that of declaring war, since the greater always contains the less. The states are not expressly prohibited from acting on the subject; but they are prohibited by manifest implication.

4. "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; and to make rules for the government and regulation of the land and naval forces." (a) This also is a part of the general power to conduct the operations of war; probably it would have been implied, had it not been expressed. The only restriction upon the power of Congress, is, that no appropriation for the use of the army, can be for a longer term than two years. The wise jealousy which suggested this restriction, is justified by the concurrent testimony of all history, that standing armies have been the destroyers of liberty. Instructed by this solemn admonition, it has been our settled policy to keep up, during peace, so small a standing army, as scarcely to be prepared for a sudden war. But navies being less dangerous, and at the same time more essential, even in peace, to protect our commerce from depredations, there is no such restriction with regard to our navy. The prohibition to the states, however,

(a) These and the two preceding provisions excited very little debate. *Mad. Pap.* 1359-61, 1495.

includes both. "No state shall, without the consent of Congress, keep troops, or ships of war in time of peace." This implies that they may do so, during war; and accordingly we have seen, that then the governor is made their commander in chief. The organization of the war and navy departments has already been referred to. But the regulations made by Congress for the government of each, in virtue of the provision now under consideration, are too numerous to admit of a description in this place. (a)

5. "To provide for organizing, arming and disciplining the militia; reserving to the states respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress." (b) It will thus be seen that the militia falls partly under the control of Congress, and partly under that of the several states. Indeed the states were particularly solicitous on this subject. This appears in the second amendment of the federal constitution, which is this: "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." In like manner the constitution of Ohio declares that "the people have a right to bear arms for the defence of themselves and the state." But the great difficulty was to apportion the power over the militia in a satisfactory manner, between the federal and state governments. The above provision draws a very nice distinction between the power of organizing, arming, and disciplining the militia, which is given to Congress, for the sake of uniformity; and that of appointing the officers and training the militia, which is reserved to the states. By the act of 1792, Congress executed its portion of the power, by organizing a uniform militia throughout the Union; and by the acts of 1820 and 1821, the rules of discipline and field exercise were made the same as for the regular army. We have before seen that the governor is made commander-in-chief of the militia, except when called into the actual service of the United States; in which case, that power devolves on the president. Each state makes provision for the appointment of the subordinate militia officers; but this is not a matter of sufficient general inter-

(a) In the case of Mackenzie, commander of the U. S. brig Somers, who, in December, 1842, had caused an officer and two men to be executed for mutiny, and who was tried by a court martial on the charge of murder, and acquitted, the question arose, whether the case was exclusively within the jurisdiction of a court martial. Application was twice made to the circuit court, while the court martial was in session, to take jurisdiction of the case; but after full argument, the application was denied. And the reasoning of the court went the length of sustaining the principle, that courts martial in the army and navy have exclusive jurisdiction of the offences committed in violation of their respective codes.

(b) See *Mad. Pap.* 1361, 1402; 3 *Story Const.* 81; *Opinion of the Judges of Massachusetts*, 8 *Mass.* 547; *Houston v Moore*, 5 *Wheat.* 1; *Martin v. Mott*, 12 *Wheat.* 19.

est, to justify a particular account. There is another provision, however, which is of great importance. Congress has power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and for governing such part of them as shall be employed in the service of the United States." By the act of 1795, Congress authorized the president to call forth the militia, when either of these three exigencies should occur. But here a question arose, who was to determine when one of these exigencies exists? The supreme judges of Massachusetts thought it was the state governor. (a) But the supreme federal court has since decided, that the president is the sole and exclusive judge of this matter, and that all other persons are bound by his decision. (b) Great as this power

(a) 8 Mass. 547.

(b) In *Houston v. Moore*, 5 Wheaton, 1, the facts were these. Pennsylvania passed a law, providing that members of the militia of that state, refusing to serve when called out by the president, should be liable to the penalties defined by Congress; but should be tried for such delinquency by a court martial held under the state authority. Houston was one of these delinquents. He was sentenced, under this law, by a state court martial, to pay a fine, and his property was levied upon to collect it. This action of trespass was brought against the officer who made the levy, on the ground that the law was unconstitutional. The state court decided in favor of the law; 3 Serg. & Rawle, 109; and this decision was confirmed by a majority of the supreme court of the United States. It was held that the acts of Congress on this subject were within their constitutional power, and amounted to a full execution of that power. But until the militia are in the *actual service* of the United States, the powers of legislation over them are *concurrent* in the general and state governments. There must be some point of time when they change their character from *state* to *national* militia. Congress have not expressly fixed what this is, but from all they have said it is to be gathered, that when the militia arrive at the *place of rendezvous*, and not before, their *actual service* commences. Houston, therefore, by refusing to march to the place of rendezvous, remained within the military jurisdiction of the state. But then Congress had already legislated on this subject, and made provision for this very case; and when this is the fact, a state, though it have concurrent power, is prohibited from legislating, even though its provisions should not be repugnant. It happened, however, in this case, that the penalty inflicted on Houston was identically that provided by Congress, though inflicted by a state tribunal; and therefore the only question was, whether the state court martial had jurisdiction over the subject, so as to enforce the laws of Congress? It was held that a state court martial had jurisdiction. Congress might unquestionably have withdrawn the whole subject from state tribunals; but not having *expressly* done so, as it had in many other cases, the presumption was, that Congress intended to leave the jurisdiction of a state court martial *concurrent* with that of a national court martial, in a case like the present. The fine was, therefore, properly inflicted.

In *Martin v. Mott*, 12 Wheaton, 19, the facts were these. Mott was a member of the militia of New York. During the last war, a requisition was duly made by the president, for a portion of the militia of New York, of which Mott was one. He refused to obey; and for this delinquency, was tried by a court martial under the act of Congress, and sentenced to pay a fine, which was levied by Martin, the marshal of that district, on his property. Mott brought an action of replevin for the property so taken. The highest court of New York decided in his favor; and the case was then brought before the supreme court of the United States, and that decision was reversed. Judge Story, who delivered the unanimous opinion of the court, took the following grounds. The act of Congress of 1795, on the subject of the militia, is within their constitutional power. By this act the president is to be considered the *sole and exclusive* judge whether the exigencies have arisen, in which he is authorized to call forth the militia.

is, to be vested in a single person, it is not easy to see how a different opinion could have been reasonably entertained. Another question was, when are the militia to be deemed in "the service of the United States," so as to fall under the control of the president, as commander-in-chief? At what point of time does their character change from state to national militia? This question has also been submitted to the same tribunal; and the decision is that the militia are not in actual service, until they have reached the place of rendezvous in pursuance of the call of the president. The mere calling them forth does not subject them to martial law; but their mustering in obedience to the call does. Still another question has been raised upon this provision; namely, whether the militia, when thus placed under the command of the president, can be by him placed under the command of any officer not of the militia? This question has not been definitively settled. But if the militia, when called into service, cannot be placed under a regular officer of the army, great confusion must be the result. And the better opinion would seem to be, that the president may place them under such command as he deems best. These provisions respecting the militia, were at first assailed with more asperity than any other in the constitution. There was a general but vague apprehension, that they tended to make the federal government too strong, and the state governments too weak. Time, however, has dissipated these alarms. Experience has shown that so far as regards the militia, the interests of the states and of the Union are one and the same. If the laws are to be executed, insurrections suppressed, or invasions repelled, the states may not only call out their own militia, but, if need be, the president will send the militia of other states to their aid. And the probability that the president will call away the militia of a state when their presence is required at home, is too remote to be feared.

There remain to be mentioned, in connection with this power of the sword, several declarations designed to guard it against abuse. 1. "No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law." This is the third amendment of the federal constitution: and nearly the same language is used in the Ohio bill of rights. It scarcely needs comment. By the common law, a man's house is his castle, and is

This, it will be seen, is in direct opposition to the opinion of the supreme judges of Massachusetts, before mentioned. And further, it is not necessary in such a case, that it should appear in point of fact, that the particular exigency actually existed. It is sufficient that the president has so determined, and all other persons are bound by his decision. Again, though Mott, by refusing to obey the call of the president, was never actually "employed in the service of the United States," yet he was liable to be tried for such refusal, by a court martial called under the authority of the United States. The fine was, therefore, properly inflicted.

privileged from all civil intrusion. This provision is designed to protect it, in like manner against military intrusion. 2. Our state constitution declares, "that as standing armies in time of peace are dangerous to liberty, they shall not be kept up; and the military shall be kept under strict subordination to the civil power." The first part of this provision, relating to standing armies of the state, is of course superfluous. It may have been well enough to declare the subordination of the military to the civil power, for without it there can be no civil liberty; but it would doubtless have resulted from the general principles of free government, without any express declaration. 3. There is another provision of the state constitution, prohibiting the infliction of corporal punishment under the military law, upon citizens in their civil capacity. But this belongs more properly to the department of criminal law.

§ 62. *Power of exclusive legislation.* (a) The words are, "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." This power is given in the strongest language. It is "exclusive" of the states, and embraces "all cases whatsoever," civil and criminal. The "places" must be acquired with the consent of the states in which they are situated, and must be for one of the five objects specified, or for other needful buildings. Thus limited, it would seem as if there could be no cause for apprehension. Yet the clause at first met with strong opposition, as one peculiarly dangerous. It was feared that these "places" might be converted, by this "exclusive" authority, into the strong holds of tyranny. This alarm, however, has been long since quieted; and the propriety of the provision, when calmly considered, is too manifest to admit of question. Without it, how could the federal government protect itself, from insult, or its property from depredation? Would it not be dependent upon the states even for a habitation and shelter? When Congress was sitting in Philadelphia, being insulted by a body of mutineers, application was made to the state authorities for protection; but it was so timidly received, and so tardily acted upon, that Congress indignantly removed to Princeton. This instance strongly illustrates the expediency of the provision. Congress can now take care of itself, its archives, and its other possessions, without being a suppliant to the states. The District of Columbia, ten miles square, selected by Washing-

(a) See 1 Kent, 429; 3 Story Const. 96—108; *Cohens v. Virginia*, 6 Wheaton, 424; *Loughborough v. Blake*, 5 Wheaton, 322.

ton, and ceded by Virginia and Maryland, is under the exclusive jurisdiction of the federal government. Its inhabitants do not belong to any state, and are not represented. It has been supposed that Congress might give them a local legislature, were it deemed expedient; but as yet their laws have been made directly by Congress. These laws may be extended, if there be occasion, throughout the Union; for Congress, when legislating for these places of exclusive jurisdiction, still preserves its character as a national legislature. But it has been decided that when this is intended, the intention must be expressed; otherwise their operation will be confined to the particular district.

§ 63. *Power as to state acts and records.* (a) The words are,

(a) See *Mad. Pap.* 1448, 1480; 3 *Story Const.* 174. In *Mills v. Duryee*, 7 *Cranch*, 481, an action of debt was brought in the District of Columbia, upon a judgment rendered in New York, and the plea was *nil debet*. At common law, this would have been good. The question was, whether it was good under the provisions above mentioned? The court held that it was not. The intention of the act of Congress was to give a judgment rendered in New York precisely the same effect, when authenticated, in the District of Columbia as it would have in New York. Now had this action been brought in New York, *nul tiel record*, and not *nil debet*, would have been the proper plea. *Nul tiel record* is, therefore, the proper plea here. The judgment is just as conclusive between the parties here, as it would be there; and consequently the only question is, as to the existence of the record. The mode of proof prescribed by the act, is of as high a nature as inspection, and can as well be resorted to by the court. *Nul tiel record* is therefore the only proper plea. Were judgments in state courts to be taken only as *prima facie* evidence in other states, the provision in the constitution would be utterly nugatory. The common law would give them precisely the same effect. Nor can it be objected, that the courts of the states cannot issue execution; for the same objection would apply to other courts of the same state. Yet it was never doubted that *nul tiel record* was the proper plea in such cases. In *Hampton v. McConnel*, 3 *Wheaton*, 234, debt was brought in South Carolina upon a judgment rendered in New York, and *nil debet* was pleaded. The decision was the same as in the preceding case; the effect of which, the court declared to be, "that the judgment of a state court should have the same credit, validity and effect in every other court in the United States, which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." In *Mayhew v. Thatcher*, 6 *Wheaton*, 129, debt was brought in Louisiana, upon a judgment rendered in Massachusetts, where the original suit was commenced *in rem*, by a process of foreign attachment. The defendant, however, subsequently appeared, and made defence; and the court seem to imply that without such appearance, or other evidence of personal notice, the judgment would not be conclusive. The plea in this action on the judgment was *nil debet*, and on demurrer this plea was set aside, in conformity with the preceding decision. But as before observed, the court intimate that *nil debet* would have been a good plea, where the judgment debtor had no notice of the original suit. The reason is, that in such case, the existence of the judgment is not conclusive evidence of indebtedness, and ought not to be the only fact put in issue. In *Shummay v. Stillman*, 4 *Cowen*, 292, it was held that *nul tiel record* is not in all cases the necessary plea. The true doctrine is, that any special plea may be pleaded, which would be good to avoid a judgment in the state where it was pronounced. This is no more than following out the principle first settled, that a judgment of any state, has now the same force and effect in every other state, as it has in the state where it was rendered. This doctrine is adopted by our own court in *Spencer v. Brockway*, 1 *Ohio*, 259; and by that of New Hampshire, in *Thurber v. Blackburn*, 1 *New Hamp.* 242.

“full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings, of every other state. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” This is a very important provision. Before the adoption of the constitution, the states were in many respects foreign to each other. And it is a general rule, that the laws, acts, and records of one nation are not judicially recognized in another, without the same proof as any other facts; and even when proved, the effect to be given to them is purely a matter of comity. But one of the objects of the federal government was “to form a more perfect union;” and the design of this provision, among many others, was to effect that object. Two points are suggested for consideration; the *proof* and the *effect*, of the public acts, records, and judicial proceedings of the states. 1. The *proof*. By the acts of 1790 and 1804, this is regulated as follows. Legislative acts are authenticated by the great seal of the state, and the certificate of the secretary. Judicial records are authenticated by the attestation of the clerk; the seal of the court, and the certificate of the presiding judge, that the attestation is in due form. All other office records are authenticated by the attestation of the keeper thereof, with his official seal, if he have one; and the certificate of the presiding judge of the county court, or the governor or secretary of state, that the attestation is in due form; which certificate, if given by a judge, must be accompanied by the certificate of the clerk, under the seal of the court, that such judge is duly commissioned and qualified; otherwise it must be under the great seal of the state. 2. The *effect*. When state acts and records have been thus proved, the constitution declares that “full faith and credit shall be given to them;” but leaves it to Congress to declare their “effect.” And by the acts before referred to, Congress has declared that they shall have, in every state and territory of the Union, the same faith, credit, force, and effect, as they have by law or usage, in the state or territory from which they are taken. The result is, that so far as these matters are concerned, the states have ceased to be foreign with respect to each other. This provision, however, as I have heretofore remarked, is to be taken with the qualification, that the laws of one state are not binding in another, unless made so by the latter. And in this connexion it may also be observed that, by the 34th section of the judiciary act of 1789, the laws of the several states are made the rules of decision, in trials at common law in the courts of the United States, except where provision is otherwise made. The effect of this provision is, not only to supply any possible omission in the legislation of Congress, but to secure uniformity in the law as administered in each state by the state and federal courts. The construction given by the latter courts to this provision is, that it applies to state laws strictly local, that

is, to the positive statutes of a state, and the construction thereof, adopted by the state tribunals, and to rights and titles to things having a permanent locality; and not to contracts or other matters of a commercial nature. (a) But the practical importance of the provisions under consideration is perhaps most strikingly illustrated with respect to judgments; for as a general rule, a judgment rendered in any state or territory of the Union now has the same conclusive effect throughout the Union, as it has in the jurisdiction where it is rendered. The only exception is where the proceeding was *in rem*, as in the case of attachment, and the defendant had no personal notice of the suit. Then and then only is he permitted to inquire into the merits of the original judgment. (b) It is not, however, to be understood that execution can be issued in one state upon a judgment rendered in another; but only that such judgment is conclusive evidence of a debt, upon which a new judgment may be recovered.

§ 64. *Power as to fugitives from justice.* (c) The words are,

(a) *Polk's Lessee v. Wendall*, 2 Cranch, 87; *Shipp v. Miller*, 2 Wheat. 316; *Gardner v. Collins*, 2 Peters, 58; *Swift v. Tyson*, 16 Peters, 1.

(b) 1 Kent, 260; *Mayhew v. Thatcher*, 6 Wheat. 129; *Starbuck v. Murray*, 5 Wend. 148; *Story's Conf. Laws*, 458—509.

(c) *Mad. Pap.* 1447; 3 *Story Const.* 675. *The People v. Schenck*, 2 Johns. 479; *Commonwealth v. Deacon*, 2 *Wheeler's C. C.* 1; *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 539. *Smith's case*, 6 *Law Reporter*, 57. It will be seen from the text, that the power to legislate on the subject of fugitives from justice, has not been considered as residing exclusively in Congress. And in fact, were it not for long acquiescence, there would be good reason to doubt whether Congress has any power at all in the premises. The fourth article of the constitution, in which this clause occurs, is of a very peculiar character. It consists chiefly of declarations in the nature of compacts between the states, by which they are precluded from treating each other as foreign nations. The first relates to state acts and records; the second to citizenship in the different states; the third to fugitives from justice; the fourth to fugitive slaves; the fifth to the admission of new states; and the sixth to the protection of the states. With respect to two of these six subjects, namely, state acts and records, and the admission of new states, power to legislate is conferred upon Congress in express words; while with respect to the other four, there is no express grant of power. If then, we apply the common principles of interpretation to this article, we must conclude that it was intended to withhold from Congress the power of legislation in these four cases, and leave it to the respective states. Else, why express it in two cases, and omit it in the other four? The constitution was framed with too much care to admit the supposition that this was not designedly done; and if designedly done, then the act of Congress above referred to, is a nullity. Yet, according to the case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539, precisely the reverse is true, and the states have no power to legislate on this subject.

Another question of great importance arises under this clause. When the demand has been made upon the executive of a state, to deliver up a fugitive, has such executive any discretion in the matter? Can the question of guilt or innocence be inquired into, in order to determine whether to deliver up or not? In other words, can such executive refuse to comply with the demand? As a matter of fact, such refusal has been given in more instances than one. But the language of the constitution is strictly imperative; the act to be done, is purely a ministerial and not a judicial act; and it would seem that the spirit as well as the letter of the clause would be violated by exercising a discretion. This is done with respect to fugitives from foreign nations; but the very object of this provision was to prevent the states from treating each other as foreign in this respect.

"a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This is another instance in which the states have ceased to be foreign with respect to each other. When a criminal offender escapes to a foreign country, it is purely a question of comity, whether he shall be surrendered up on being demanded for punishment; there being no positive obligation so to do, which is capable of being enforced. But if the states had been left in this relation to each other, where escape from one to the other is so easy, criminal justice would have been to a considerable extent defeated; for punishment can only be administered within the jurisdiction where the offence is committed. Hence the strong motive for the provision in question, which takes from the states the power of refusing to deliver up offenders, when properly required so to do. By the act of 1793, Congress has pointed out the manner in which the demand and surrender must be made; an indictment must be found, or an affidavit made, in the state where the offence was committed, which must be certified as authentic by the executive thereof. This must be accompanied by a formal demand upon the executive of the state to which the offender has fled; who is thereupon required to cause the arrest of the offender, and his surrender to the agent of the executive making the demand, if he appear within six months. The proceeding is to be at the cost of the state demanding, and any person resisting is liable to fine and imprisonment. It will be seen at once that these provisions, strictly construed, must often be inadequate to their object. If the arrest cannot be made until these preliminaries are complied with, a fugitive may easily fly beyond the Union. This consideration has induced courts to look to the spirit rather than the letter; and to hold that a fugitive may be arrested on probable evidence, and detained for a reasonable time, to admit of the proper demand being made. And in Ohio, a statute has been enacted for this express purpose. This authorizes justices of the peace to hold examinations, and upon what they deem sufficient proof, either to commit the accused for a reasonable time, or deliver him up at once to the proper officer for removal.

§ 65. *Power as to slaves.* (a) We have already seen that liberty

(a) One of the first acts of the first continental congress was an agreement not to participate in the slave trade. 1 Pitkin's Hist, 289. The original draft of the Declaration of Independence contained a clause severely reprobating slavery, which was stricken out at the request of South Carolina and Georgia. Mad. Pap. 18, 24. In the debate on the articles of confederation, when the proposition was, to fix the quotas of taxation according to population, a motion to limit it to the *white* population was lost by a vote of six to seven—ib. 27—32. The articles of confederation finally made the valuation of land the measure of contribution. But this being found inconvenient, Congress in

is the natural right of every human being. It also forms one of the fundamental conditions of our social compact. In our various declarations of rights, it is asserted to be the natural, inherent, and unalienable right of all men without exception. Hence it follows that slavery can be justified upon no principle, but that of uncontrollable necessity. If, therefore, it had not been deeply rooted in this country at the time of framing the federal constitution, there is no doubt that it would have been absolutely and for ever prohibited in the strongest language. But at this epoch, a traffic in African slaves, as lucrative as it was inhuman, was carried on by all civilized nations. Efforts had been repeatedly made by the colonies to prevent their introduction here, but they were universally frustrated by the British king. The consequence was, that before our independence, the labor of several of the colonies was chiefly performed by slaves, who constituted a considerable proportion of the property of their owners; and the number continued to increase up to the moment of framing the constitution. To abolish slavery, therefore, by this instrument, was out of the question. Upon such a condition, the Union could not have been formed. On the contrary its toleration, so far as the federal government was concerned, was a matter of absolute necessity. And in this connexion I shall refer to all the provisions which bear upon the subject; first remarking that the word, *slaves*, is not used, nor their color referred to, in the federal constitution.

Importation of slaves.(a) "The migration or importation of

1783, recommended an amendment, adopting the ratio of population, with the slave compromise of three-fifths. 2 Story Const. 112. Mad. Pap. 523, 842. This amendment was never made, though agreed to by eleven states, but the same compromise was adopted by the framers of the constitution. The first vote was nine to two. Mad. Pap. 843. A subsequent proposition, to exclude slaves from the ratio of representation, was lost by a vote of one to ten—ib. 1261-6. On the general subject, see 2 Kent, 251-8; 1 Black. Com. 418-25.

(a) Hardly a question in the convention was more obstinately contested than this. The delegates from North Carolina, South Carolina, and Georgia, positively declared that these states would not consent to the constitution, if the importation of slaves was prohibited. Mad. Pap. 1388-96. The subject was referred to a special committee who reported a compromise—ib. 1415. This was afterwards modified into its present shape—ib. 1427-30. And see *Groves v. Slaughter*, 15 Peters, 449; *U. S. v. the Amistad*, 15 Peters, 518. It will be observed that Congress has thus far confined its legislation to the foreign slave trade, which is now totally abolished, so far as our citizens are concerned. But the question is beginning to be debated, whether Congress has not the power to abolish the domestic slave trade also? Of course, I speak only of the existence of the power, not of the expediency of exercising it. The clause above quoted is not in terms confined to importation from abroad. On the contrary, the phrase, "such persons as any of the states now existing shall think proper to admit," seems rather to look to importation into the different states, than into the United States generally; and it would as well include importation into one state from another state, as from a foreign country. And since Congress has power "to regulate commerce among the several states," if we take these two provisions together, and regard slaves as property, the conclusion would seem to be, that Congress has power to regulate, and even to prohibit the slave trade between the different states. But if this power exists, it is confined to

such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." Here was a recognition in 1787 of a power in Congress to prohibit the importation of slaves after 1808, and to discourage it by taxation before that time; and it was the first provision in any country, which looked towards the abolition of the slave trade. By the acts of 1794 and 1800, Congress did all that this provision would allow, by prohibiting citizens or residents of the United States from all concern in the slave trade, except direct importation into this country. And no sooner was the constitutional restraint removed by lapse of time, than importation was directly prohibited, under severe penalties. The act for this purpose was passed in 1807, to take effect from the first day of the year 1808. Again, the act of 1819 authorized armed vessels to be stationed on the coast of Africa to prevent the slave trade in any form by citizens or residents. And finally, the act of 1820 declares participation in this trade to be piracy, and punishable with death. Thus the pledge implied in the reservation of this future power, the immediate exercise of which was opposed by too many interests, has been abundantly redeemed; and the nations of Europe, in prohibiting this trade, have but followed our example.

Representation of slaves. I have already described the compromise between the slaveholding and non-slaveholding states, by which the apportionment of representatives and direct taxes is "determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."

Fugitive slaves. (a) The words are, "No person held to service or labor in one state, under the laws thereof, escaping into

traffic between the states, and does not embrace that traffic between man and man, which takes place wholly within one state; because such traffic is neither "importation into any of the states," nor "commerce among the several states." It follows, also, that if Congress has the power in question, it is withdrawn from the states, being, as we have before seen, an exclusive, and not a concurrent power. Public opinion, however, is very much divided upon this whole matter. It may be well to remark, that the constitution elsewhere declares that no amendment made prior to the year 1808, shall in any manner affect the provision relating to the importation of slaves, or that relating to their representation. But this period having long since terminated, there is no longer any express compact for the continuance of slavery.

(a) *Mad. Pap.* 1456, 1589. *Case of Aves*, 18 Pick. 193; *Commonwealth v. Taylor*, 4 Law Reporter, 274; *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 539; *Jones v. Vanzandt*, 1 West. Law Jour. 2, 56. The act of Congress mentioned in the text has been acquiesced in so long that it may now be thought too late to question its validity. But were the question new, there would be the same reason for holding that Congress has no power to legislate concerning fugitive slaves, as has before been stated with respect to fugitives from justice; there being not only no express grant of such power, but a strong implication to the contrary. And so the states are beginning to consider and treat the matter, by taking it into their own hands. In several of them, provision is already made for a trial by jury, before the slave is deliver-

another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." By the act of 1793, Congress has pointed out the course of proceeding. The owner of a fugitive slave or his agent, is authorized to arrest him in any of the states, and take him before a federal judge or state magistrate; and upon satisfactory proof of his title, he is to receive from the judge or magistrate a certificate thereof, which is a sufficient warrant for removing the slave back to the state from which he fled; and there is a penalty of five hundred dollars for knowingly harboring the slave or obstructing his removal. The ordinance of 1787, framed a few months before the federal constitution, with the wisest forecast, for ever prohibited slavery in the North Western Territory; and the prohibition is repeated in the constitution of Ohio, with the declaration that no future amendment shall ever alter it. "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes whereof the party shall have been duly convicted." The ordinance also contained a provision similar to that before described respecting fugitive

ed up; and who does not feel that where liberty is the question at issue, something more than summary proceedings before a magistrate should be provided? Yet according to the case of *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 539, all state legislation upon this subject is unconstitutional and void. It will be observed that the clause now under consideration includes only slaves "*escaping*" from one state into another. If therefore a master voluntarily bring, send, or permit his slave to go into a non-slaveholding state, such case is not within the clause, there being no escape; and the slave is thereby held to be set free. An exception has sometimes been made where a master merely travels with his slave through a state, without intending to tarry there; but recent decisions have not sustained even this exception. The doctrine therefore now is, that none but those who are in the strictest sense fugitive slaves, can be demanded under this provision. Another serious question is, whether Congress has power to abolish slavery in the District of Columbia? The power "to exercise exclusive legislation in all cases whatsoever," clearly includes this, unless there be some prohibition of it elsewhere; and there is no where any express prohibition. But it is claimed that such prohibition is clearly implied from all the provisions on the subject of slaves. The course of argument may be thus stated. The existence of slavery was one of the chief obstacles to the formation of the Union. Without a liberal compromise of conflicting interests and opinions, this obstacle could not have been overcome. The result of that compromise was the recognition of slavery by the constitution. And although it is no where said that Congress shall not interfere with it, further than to abolish the foreign slave trade, yet as the same conflicting interests and opinions still exist, there is the same reason for continuing the compromise that there was for making it; and therefore the spirit, if not the letter of the constitution, is opposed to any interference with domestic slavery by Congress. In other words, the faith of the nation is tacitly pledged to leave the subject of slavery wholly to the states in which it exists. But on the other hand, it is said that there can be no implication against human liberty. The result of the slave compromise is to be found in the constitution, and it goes no further than the words import. Had it been designed to prohibit Congress from abolishing slavery in the District of Columbia, or the slave trade between the states, it would have been so expressed. But this is so far from being done, that there is an implied admission that the slave compromise itself may be changed after 1808, by declaring that it shall not be done before. There is then no other pledge than the constitution itself definitively expresses.

slaves. Thus even where slavery is expressly prohibited, we do not carry the prohibition so far as in England. The fetters of a slave do not in all cases fall from him, the moment he treads upon our soil; but he cannot be retained here in slavery. When Missouri was about to be admitted into the Union, an attempt was made to prohibit slavery there, but without success. On this occasion, it was strenuously contended that Congress had not the power to prescribe such a condition of admission. In the result, however, the power seems to have been conceded; for the act expressly prohibits slavery in all the territory west of the Mississippi, and north of the latitude of $36^{\circ} 30'$, except Missouri.

Free colored persons. (a) I will take this opportunity to say a word respecting *free negroes*. Their condition varies considerably in the different states. Some exclude them altogether. Others allow them nearly all the privileges of citizens. But in Ohio the policy has been to discourage them as much as possible from coming here, without absolutely excluding them. Our constitution declares that "no indenture of any negro or mulatto executed out of the state, or if executed in the state, where the term of service exceeds one year, shall be of the least validity; except those given in the case of apprenticeships." The object of this provision is partly to prohibit any semblance of slavery, and partly to discourage the introduction of free negroes, by disabling them from binding themselves at all before they come here, or for more than one year after, unless they be under age. They are also placed by statute under various other disabilities. They cannot vote, nor hold offices, nor sit as jurors. They cannot be witnesses where either party is white. They can derive no benefit from the common school fund. They cannot gain a legal settlement, so as to be benefited by the poor laws. Those coming from abroad cannot remain in the state, without giving security against becoming a township charge; and there is a penalty for harboring or employing them, until they have complied with this requisition. In fact, the only provision in their favor, is that which punishes kidnapping them. These provisions are generally confined to "blacks and mulattoes." A mulatto is a person begotten between a white and a black. Consequently, a person of any shade above half black, would not be within these disabilities. And our courts have manifested a disposition to construe these provisions strictly, in favor of liberty and equality. Some of them certainly savor of unnecessary severity.

§ 66. *Power as to the public domain.* (b) This has been already discussed under the four heads of acquisition of title; scheme of survey and sale; creation of territorial governments;

(a) *Medway v. Natick*, 7 Mass. 88; *Gray v. Ohio*, 4 Ohio, 353; *Jeffries v. Ankeny*, 11 Ohio, 372; *Thacker v. Hawk*, 11 Ohio, 376.

(b) *Ante* § 13, 14, 15.

and admission of new states into the Union. Nothing further, therefore, remains to be said.

§ 67. *Power to protect the states.* (a) The words are, "the United States shall guaranty to every state in this Union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence." This language makes the general protection here guarantied, not merely a matter of power, but of duty. It binds the whole to protect the parts. Some fears were entertained at the outset, that a pretext would here be found for interfering in the concerns of the states, when there was no occasion. But all agreed that there might be occasions when federal interference might be desirable, and therefore the power ought to be conferred. The only question was, whether it had been sufficiently guarded. The clause points out three occasions of interference, which may be viewed separately. *First*, as to the form of the state governments. So long as they continue "republican," there is no authority to interfere. This term comprehends such a variety of modifications, as to leave the states the widest field for choice that can be desired. They are merely prevented from introducing a despotic, monarchic, aristocratic, or in one word, anti-republican form of government. When they shall attempt to do this, the general welfare will be threatened, and they ought to be prevented. But until they do so, there can be no interference with their form of government. *Secondly*, as to invasions. Here there can be no question. To invade a state, is to invade the Union. If the state can protect itself, it is well; if not, it must need federal assistance. This power, therefore, can never do harm, but always good. *Thirdly*, as to domestic violence. Here there is more room for apprehension. The cause being domestic, interference would be a matter of extreme delicacy. And on this account it is provided, that federal interference shall not take place, until the state has requested it. This will of course happen only when there is actual need; consequently there can be no danger from this quarter. On the whole, then, it would seem that this provision is as carefully guarded, as it is important to the states. It makes the stronger, as it always should be, a protector of the weaker, without the power of becoming an oppressor.

(a) The convention at first resolved to guaranty to each state a republican constitution and its existing laws. Mad. Pap. 861. This proposition was afterwards modified by striking out existing laws, and inserting protection against foreign and domestic violence—ib. 1141. A distinct power to subdue a rebellion in any state upon the application of its legislature, was negatived by a tie vote—ib. 1349-51. The clause was then agreed to in its present shape—ib. 1466-8.

LECTURE X.

INCIDENTAL POWERS.

§ 68. *Their general nature.* (a) In the preceding lecture, I have discussed all the enumerated powers of the federal constitution, together with the corresponding prohibitions. To one who has never before thought upon the subject, it may appear strange that so few specifications should be sufficient to describe the extent of federal authority. But it is to be remembered that these specifications only describe the *ends* to be effected by the federal government. The *means* to be employed in effecting these ends, are not enumerated, but constitute what are termed *incidental powers*. And here the question may be asked, why these means were not also enumerated? Why was not the enumeration, once begun, rendered complete? Why was any thing left to implication? I will endeavor to answer these questions. In the first place, there was no necessity for carrying the enumeration further. It is a general principle of common sense, running through all agencies, that where authority is given to effect a particular end, it necessarily includes the authority to use the proper means, without any specifications to that effect. In other words, where a general power is given to do a thing, every particular power necessary for doing it is included, without being expressed. Now the general powers deemed necessary for effecting the national purposes for which the federal government was created, having been specifically enumerated, all the particular powers necessary to carry into effect these general powers, are, on the above principle, implied, without being named; for there is nothing peculiar in the nature of this constitution, to make it an exception to this otherwise universal rule of construction. The ninth and tenth amendments were never designed to produce this effect, as has been sometimes alleged. The ninth amendment declares that "the enumeration in this constitution of certain rights, shall not be construed to deny or disparage others retained by the people." This was added, out of abundant caution, to exclude a possible inference, founded on the legal maxim, that the enumeration in any instrument of certain particulars, excludes those not enumerated. It relates, not to the *powers*, but to the *prohibitions* of the constitution; and merely declares, that because some things are specially prohibited, it does not thence follow that any thing not prohibited, is therefore permitted; and that in order to ascertain whether any particular thing is permitted, we

(a) See Story Const. 109, 752.

must look further, and see whether the power to do it is conferred. And this brings me to the tenth amendment, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It is obvious that this amendment does not affect the question, what powers are in fact delegated? It merely asserts what never could have been doubted, without such an assertion, namely, that Congress being the creature of the constitution, and possessing no original and inherent powers, can only exercise such as are delegated; or, in other words, that where a grant is made, whatever is not granted, remains in the grantors. Moreover, there is one historical fact which completely rebuts the inference that this amendment was intended to confine Congress to the exercise of express powers. In the articles of confederation, the words were, "all powers not *expressly* delegated;" and when this amendment was before Congress, a motion was made to insert the word "*expressly*," and rejected; on the ground that it is impossible to confine any government to the exercise of express powers. The conclusion therefore is, that there was no necessity for a further enumeration.

But a still more satisfactory reason is, that such a complete enumeration as would leave nothing to implication, would have been utterly impossible. No human sagacity could have foreseen all the means which circumstances might render necessary to effect the ends which were foreseen. And even if such foresight had existed, the attempt to make such enumeration would have expanded the constitution through volumes. This alone, conceding the possibility, would have been a sufficient reason for terminating the enumeration with the ends to be effected, and leaving the means to implication. Why waste time in describing the less, when it is already contained in the greater? To what purpose is our language furnished with general terms, if they cannot supersede the necessity of enumerating the particulars they contain?

Yet notwithstanding these very sufficient reasons for not enumerating the secondary powers, there are many, who, from the fact of their not being enumerated, have denied their existence. These persons would hold the federal government to the strict letter of the constitution, and allow the exercise of no powers not specifically enumerated. I have not room to detail the arguments upon which this doctrine of *strict construction* rests. They are, however, chiefly derived from four sources; *first*, the history of the times, evincing a deep-rooted jealousy of federal power, and a strong determination to limit it in the strictest manner; *secondly*, the fact that the constitution contains several pleonasm, thereby indicating an intention to leave nothing to implication; *thirdly*, the fact that certain powers are enumerated, thereby raising the inference that those not enumerated are excluded; and *fourthly*,

the amendments just referred to, which are alleged to negative the idea of implied powers. To all these arguments, however, it might be sufficient to reply, that if any government were to be confined to the strict letter of a brief constitution, it could not fulfil the ends of its creation; and therefore we cannot presume an intention so to confine it. But it would seem as if the framers of the federal constitution, than whom a wiser body of men was never convened, anticipated that such arguments would be made use of, and therefore resolved to furnish in the constitution itself, a conclusive answer to them. For singular as the proposition may at first appear, *incidental powers are expressly conferred*. The clause conferring them immediately follows the specific enumeration, and is in these words: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." (a) This clause, therefore, puts an end to all doubt whether Congress can exercise incidental powers. The only question that can arise, is, what powers are incidental, within the meaning of the terms here employed? In other words, when is a law "*necessary and proper for carrying into execution*" the enumerated powers of the federal constitution? The answer must depend upon the meaning we annex to the words "necessary and proper." The advocates of a *strict construction* insist that the meaning is the same as if the phrase had been, *absolutely necessary, indispensably necessary, or absolutely indispensable*. They hold that this provision leaves Congress no discretion whatever in the choice of means to effect the authorized ends; and that any law passed in pursuance of this power, must be a *sine qua non*; one without which the specific end could not possibly be effected. But on the other hand, the advocates of a *liberal construction* consider the meaning of the words "necessary and proper," to be the same as if the expression had been, *convenient, suitable, appropriate*, or some other term of like import. They hold that the provision gives Congress a discretion in the choice of means, to effect the authorized ends; and that laws passed in virtue of this power, need not be the only possible means of effecting the end proposed, provided they be appropriate means. And as this is the construction upon which the government has been hitherto administered, I shall briefly state the leading arguments in favor of it.

1. The terms themselves admit of this enlarged meaning. Even had the word "necessary" been used alone, neither its grammatical nor popular sense would have required the strict

(a) See 3 Story Const. 118; M'Culloch v. Maryland, 4 Wheat. 412. In the convention this clause was adopted unanimously and without debate. Mad. Pap. 1370.

construction. It generally means *needful, requisite, conducive to*; and admits of degrees of comparison. Accordingly when we would convey the idea of extreme urgency or indispensable necessity, we prefix a qualifying word, and say *absolutely* or *indispensably necessary*. This very constitution furnishes a conclusive example, when it prohibits the states from laying any tax on imports or exports, "except what may be *absolutely necessary* for executing their inspection laws." But the word "necessary," is not used alone. It is followed by a qualifying word of another sort, which instead of increasing, diminishes the idea of urgency. The word "proper," would have no meaning whatever, if the strict construction were adopted. But the liberal construction gives to both words their natural and appropriate signification. In the common use of language, who would ever think of using the terms, "necessary and proper," to convey the idea of absolute and extreme necessity?

2. There is nothing in the character or situation of the clause to justify the strict construction; but the contrary. It is placed among the powers of Congress, and not among the limitations of power. It purports to be an additional power, and not a restriction; to enlarge, and not to diminish the powers of Congress. But even supposing it had no other effect than simply to exclude the inference against incidental powers, without enlargement or diminution, we should still arrive at the liberal construction, on the general principle of agency before mentioned; which always allows the agent a choice of means, unless the contrary be expressed.

3. The necessity of the case demands the liberal construction; since without it Congress could not beneficially promote the national interest. Probably more than half of all the legislation of Congress has no other constitutional warrant than this liberal construction of incidental powers. This will be evident from the instances to be given hereafter. Meantime, I will state the rules by which to determine whether a proposed measure comes within the sphere of incidental powers or not.

These rules are two; *first*, there must be a primary or general power, expressly conferred by the constitution; and, *secondly*, the measure in question must be a convenient and proper means of carrying into execution this primary power. These rules are deduced from the clause itself. The power declared is, in substance, to pass all laws which may be requisite for effecting any of the objects specified in the constitution. And so long as Congress adheres to these rules, there can be no danger from incidental powers. Let every measure, for which there is not a specific provision, be a manifestly proper means of effecting an end, for which there is a specific provision; and the vehement jealousy of incidental powers, which has always existed, will never be justified by experience. In order to illustrate these general views, I

will now instance the most prominent of the incidental powers hitherto exercised.

§ 69. *Power to purchase foreign territory.* (a) We have seen that since the formation of the federal government, the United States have purchased the territories of Louisiana and Florida; now, the constitution no where contains any express power to make these purchases. If, therefore, the power exist, it is incidental; and by applying to it the test rules before laid down, we shall find that it requires the utmost stretch of liberal construction. To make such a purchase involves two acts; *first*, a treaty stipulating the terms of purchase; and, *secondly*, an appropriation by Congress to pay the purchase money. First, then, does the treaty-making power extend thus far? If so, it can only be as a general incident to national sovereignty. Secondly, has Congress power to raise and appropriate money for such purpose? If so, it can only be as incidental to the promotion of "the common defence and general welfare," upon the most enlarged construction of these terms. It is not a little singular, therefore, that this power, the most questionable, perhaps, of any yet exercised, should have been first exercised during the preponderance of a party including the most prominent advocates of a strict construction.

§ 70. *Power to lay an embargo.* (b) The power to lay an embargo is no where expressly conferred. To which then of the enumerated powers is it incidental? It may be incidental to two of them; the war power, and the commercial power; but it can only be so on the liberal construction; for it can never be absolutely indispensable to the exercise of either. But it meets the test of an incidental power, because it may be a convenient and proper means of preventing the evils of war, and of ultimately promoting the commercial welfare of the country. This power, like the preceding, was first set up by the advocates of a strict construction.

§ 71. *Power to establish a military academy.* (c) This power is no where expressly conferred, but has been exercised as an incidental power. The object of such an establishment being to educate young men for the army, and thus the better enable the country to prepare for and carry on war, it is evidently a convenient and proper, though by no means an indispensable method, of promoting the common defence and general welfare. On the liberal construction, therefore, the power to establish a military or naval academy is clearly incidental to the general power of defence; but on a strict construction it is not.

§ 72. *Power to pass the alien and sedition laws.* (d) These

(a) See 3 Story Const. 156.

(b) See 3 Story Const. 161. U. S. v. Brig William, 2 Hall's Law Jour. 255.

(c) See 3 Story Const. 155.

(d) See 3 Story Const. 164, 743.

terms have a peculiar import. Two laws, known by their title, were enacted in 1798, and have long since expired by their own limitation. The alien law, in substance, authorized the president to order out of the country, under severe penalties for disobedience, such aliens as he should deem dangerous to its peace and safety. The sedition law, in substance, provided for punishing by fine and imprisonment, any persons who should unlawfully combine together, with intent to obstruct any measure of the federal government; or who should write, print, utter, or publish any thing false, scandalous, and malicious, against the federal government, or any department or officer thereof, with intent to bring the same into hatred and disrepute, or stir up sedition. The constitutionality of both these laws has been vehemently assailed, and no acts of the government have been more unpopular. It is admitted on all hands that there is no express authority to pass them; and it certainly is not very easy to bring them within the test rules before laid down for incidental powers. They were, however, vindicated at the time, and have since been vindicated, as exercises of powers clearly incidental to the power and duty of self-protection, which must necessarily belong to every government, whether specified or not.

§ 73. *Power to create a national bank.* (a) The power to

(a) In *M'Culloch v. Maryland*, 4 Wheaton, 316, the question arose upon the validity of a law of that state imposing a tax upon the branch bank of Baltimore. This law was of course valid, if it did not interfere with the constitution or laws of the United States. The first inquiry, therefore, was, whether the act incorporating the bank, had the force of a law? Had Congress power to create such a corporation? No such power was specified among the enumerated powers. Was it included under the general grant of power to pass all laws "*necessary and proper*" for executing the specified powers? The incorporation of a bank was manifestly a *convenient and suitable* means of carrying on the fiscal operations of government. Did the words "*necessary and proper*" mean anything more? Was no law "*necessary and proper*" within the meaning of the constitution, but one which was absolutely and altogether indispensable? This could not be the import of the words, because so narrow a construction would set aside almost half the laws of Congress. It is not absolutely necessary to punish smuggling, in order to create a revenue; or to punish mail robbery, in order to have the mail transported; yet these laws can only stand upon the ground that they are "*necessary and proper*" means of effecting those ends. The import, therefore, of this provision must be, to give Congress a discretion in the choice of means; and so long as the means they adopted were suitable and appropriate to effect a constitutional end, the means themselves were constitutional. It was therefore the unanimous opinion of the court, that the law incorporating the bank was constitutional. And as it was one of the provisions of this law, that the directors of the bank should have power to locate branches where they should think fit; the location of the branch at Baltimore was therefore a constitutional act. This being settled, is the law of Maryland valid? There is no express prohibition in the constitution against such a law. The states are forbidden to lay duties on imports, exports, and tonnage; and this is the only *express* limitation upon their power of taxation. Is there any *implied* limitation? To answer this, we must look to the nature of the power contended for. If Maryland can lay any tax upon the bank, she can lay a high tax as well as a low one. She can thus expel the branch bank from her jurisdiction. Every other state can do the same. Thus if we admit the power of the states to tax the bank, we admit their power to destroy it. But the law incorporating the bank, being pursuant to the con-

create a corporation, for any purpose, is no where expressly conferred; and it is known that the proposition to confer such power, was made in the federal convention, and failed. Yet this power, which was denied as an end, has been twice exercised as a means. A national bank was incorporated, first in 1791, and again in 1816; and the constitutionality of these acts has been twice affirmed, after the most ample discussion, by each of the departments of the federal government. To which, then, of the enumerated powers is this power incidental? On the strict construction it is not incidental to any one, for it is not absolutely indispensable to the execution of any one. But on the liberal construction it is incidental to the revenue power, the commercial power, the currency power, and the power of defence; for a national bank is found to be an exceedingly convenient and useful agent or instrument of the government in all its fiscal operations, which are more or less connected with each of these powers. This has been already shown in discussing the subject of currency; and on this general ground rest all the arguments in favor of its constitutionality.

§ 74. *Power to give a priority to the United States as creditor.* (a) By the acts of 1797 and 1799, a priority is secured to the United States over other creditors, where a debtor becomes insolvent; and though there is no express power for this purpose, yet these acts have been held constitutional, upon the liberal con-

stitution, is declared to be "the *supreme law*" of the land. Thus a *staté* may do indirectly, what it could not directly; it may indirectly abrogate the supreme law. The argument, then, is reduced to this. A power to create a bank, implies a power to preserve it. A power to tax a bank, implies a power to destroy it. There is a direct incompatibility in the exercise of these two powers. Which must yield? That which is supreme, or that which is subordinate? Manifestly the latter. The law of Maryland is therefore unconstitutional. This is a brief sketch of the argument of the court. But it was intimated that a state might tax the real estate of the bank, and the stock owned within its jurisdiction. In *Osborn v. the Bank of the United States*, 9 Wheaton, 738, which arose under a law of Ohio imposing an enormous tax, for the express purpose of expelling the branch bank from its limits, the constitutionality of the bank was conceded; but the court was requested to review so much of its former opinion as pronounced it unconstitutional for a state to tax the bank. The argument in favor of taxation proceeded upon the ground, that the corporation was created for private and individual purposes; that its object was private trade and profit; and that the exemption from taxation was not *an incident* to any such corporation. Had the exemption been expressed in the charter, the question would have been different. So also if the institution had been a public one, like the mint or post office, taxation would not have been constitutional. But this was neither a public institution, nor expressly exempted. It was therefore liable to taxation. The court denied these premises. The bank was not created for its own sake, or for private purposes. It was never supposed that Congress could create such a corporation. The sole ground of its constitutionality, was, that it was created for public purposes. Private profit was only an incident to the main purpose. The premises being false, the conclusion did not induce the court to change its former opinion.

(a) See 3 Story Const. 153; *U. S. v. Fisher*, 2 Cranch, 202. *U. S. v. Hooe*, 3 Cranch, 73; *Harrison v. Sterry*, 5 Cranch, 289; *Prince v. Bartlett*, 8 Cranch, 431; *Thellusson v. Smith*, 2 Wheaton, 396; *Conard v. Atlantic Insurance Company*, 1 Peters, 388.

struction of incidental powers. The ground is, that Congress, being authorized to collect the revenue and defray the expenses of the government, may use all eligible means for these ends; and the law securing a priority or preference, is of this character; because, without it, many of the debts might be lost, and the revenue impaired. The provisions apply to all debtors, when either of these four cases of insolvency occur; namely, *first*, when the debtor dies insolvent; *secondly*, when an insolvent debtor makes an assignment; *thirdly*, when he commits an act of legal bankruptcy; *fourthly*, when he absconds or conceals his property. The priority, however, is not in the nature of a *lien*, operating from the time of contracting the debt; for it only operates from the occurring of one of these four acts; and accordingly, if another creditor has acquired a specific *lien*, by mortgage or judgment, upon the debtor's property, the priority of government cannot supersede it.

§ 75. *Power of punishment.* We have seen that Congress has the express power of punishment in five classes of cases; namely, offences against the currency; on the high seas; against the law of nations; in places of exclusive jurisdiction; and treason. But in point of number, these offences form but a small proportion of those actually made punishable by Congress. The rest, therefore, must have been provided for in the exercise of incidental powers. These may all be included under the six following classes. 1. Offences against the revenue laws, of which there are many; and the power to punish which, is incidental to the revenue laws. 2. Offences against the Indians, the power to punish which is incidental to the power of regulating commerce with the Indian tribes. 3. Offences against the post office regulations, of which there are many, and the power to punish which is incidental to the power of establishing post offices and post roads. 4. Offences against foreign nations, other than those ascertained by the law of nations, the power to punish which is incidental to the power to manage our foreign relations. 5. Offences against the federal government, other than treason; the power to punish which is incidental to the power of self-protection. 6. Offences committed by federal officers, the power to punish which is also incidental to the power of self-protection. In all these cases, the power of punishment is clearly incidental on the liberal construction, but not on the strict construction; because, though very salutary, it is not absolutely indispensable.

§ 76. *Power to protect domestic industry.* (a) This power, so important to our national prosperity, is no where expressly conferred. But Congress has power, as we have seen, to raise a revenue for the purpose of paying the debts and providing for the common defence and general welfare; and also to regulate com-

(a) See 2 Story Const. 429.

merce with foreign nations. And the power to encourage our own trade and manufactures, by such a *tariff* of duties as will bring the price of imported products of foreign labor up to that for which the same commodities can be produced in this country, has been constantly exercised, since the formation of the government, as incidental to the revenue and commercial power; though not without strenuous opposition. I do not propose to examine minutely the arguments on either side. It is perfectly obvious, however, that in a new country like ours, where vacant land is so abundant and so cheap; and where the mass of the people are so independent and respectable, the price of labor must for ages be higher, than in the crowded and overgrown nations of the old world; and consequently, that if our ports were thrown open to the free and indiscriminate introduction of all foreign products, our countrymen could not sustain the competition; for it is certain that many commodities can be produced abroad and transported hither, at less cost than that for which they can be produced here. Only two alternatives therefore remain; either to forego these branches of labor altogether, and depend entirely upon the supply from abroad; or to lay such duties on the importation of these commodities, as will protect our own labor from a ruinous competition. And as the latter alternative is deemed, for various reasons, more conducive to the general welfare, than the former, it has become a part of our general policy. And there is no doubt of the incidental power to grant this protection, on the liberal construction; though not being imperatively necessary, it would not exist on the strict construction.

§ 77. *Power to make internal improvements.* (a) The phrase, internal improvements, when used with reference to the legislation of Congress, includes the construction of *roads* and *canals*, and the improvement of *water courses*. If Congress have power to provide for any or all of these things, that power is incidental; being no where expressly conferred. It is possible that some of these improvements may be convenient and proper means of facilitating commercial intercourse; and thus far, the power to make them may, perhaps, be incidental, on the liberal construction, to the power to regulate commerce. But the power to make internal improvements is most generally derived from the revenue power. We have seen that this power may be exercised in any way which will promote the common defence or general welfare. If therefore a contemplated improvement be a suitable means of producing one of these results, the power to *raise and appropriate money* for making such improvement, would seem, on the liberal construction, to be unquestionably incidental to the revenue power. But the terms require that the improvement be strictly national in its character, and calculated to benefit the whole

(a) See 3 Story Const. 149, 440.

Union, in one of these ways; for if it be of a merely sectional or local character, however beneficial to a particular district, it can in no sense be said to promote the *common* defence, or *general* welfare. Again, while the power to raise and appropriate money, under these qualifications, is thus clear, a difficulty arises, with reference to the *actual construction* of such works, by the federal government, from the local jurisdiction of the states, over the territory within their respective limits. The whole spirit, as well as the frequent expressions of the constitution, indicate that without express provision for that purpose, the jurisdiction is not to be interfered with, unless by the *consent* of the states concerned; and the express provisions include only two kinds of improvements; namely, *post roads* and *military roads*. When the construction of these becomes necessary, Congress need not consult the states; but for the construction of any other improvements within the states, it would seem that their consent should be first obtained.

I have thus briefly considered nine of the most prominent of the incidental powers hitherto exercised. I might select others of a less questionable character. I might refer to the creation of the various subordinate departments of government, and to the very numerous legislative details connected therewith; all of which are more or less the fruits of incidental power; but enough has been said to illustrate the nature of incidental powers, and the propriety of the liberal construction put upon the clause providing for them. If, instead of this, the strict construction had been adopted in practice, it must be evident that the federal government would have been comparatively inadequate to the accomplishment of the grand objects contemplated by the framers of the constitution, as we gather them from its comprehensive preamble.

LECTURE XI.

BILL OF RIGHTS.(a)

§ 78. *Equality of rights.* In the two preceding lectures, I have discussed, under the heads of *enumerated* and *incidental*, all the powers delegated to the federal government. In the same connexion, I have also considered the federal and state prohibitions relating to the subject matter of these several powers. But there still remain a number of federal and state prohibitions relating to other matters, some direct and others indirect; and

(a) See 1 Black. 127; 2 Kent, 1; 3 Story Const. 713; Mad. Pap. 1565-6.

constituting, in the strictest sense of the words, our *declared* or *fundamental rights*. A brief discussion of these prohibitions will terminate our view of constitutional law. The declaration of independence announces the fundamental rights of man, in this strong and comprehensive language:—"We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The federal constitution contains no similar declaration; but in the state constitutions, the same sentiments are universally reiterated. The constitution of Ohio thus commences the declaration of rights: "That the general, great, and essential principles of liberty and free government, may be recognized, and for ever unalterably established, we declare that all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining happiness and safety." These general and fundamental propositions furnish little matter for comment. They are rather to be regarded as prefatory to the specific declarations which follow them as corollaries. To these, therefore, let us direct our attention. I shall endeavor to group them together, as well as I may, with reference to their subject matter, beginning with *equality*.

The nature of political equality has already been explained. (a) The language of our constitution is very carefully guarded, and is literally true. All men are not born absolutely equal in every respect; for there must be endless diversities of condition, capacity, means, opportunities, and the like, which no social organization can prevent. But equality of civil and political rights is the birthright of all men: and this is precisely what our constitution intends by the declaration, "that all men are born equally free and independent;" instead of asserting that all men shall be absolutely equal in condition. The chief provision designed to secure our political equality, is that which prohibits *hereditary distinctions*. It is in vain that Blackstone and others insist "that the distinction of rank and honors is necessary in every well governed state;" for experience proves that men will of themselves create all the distinctions required, without the aid of government, to perpetuate them in the blood. And accordingly the federal constitution prohibits both the United States and the individual states from conferring, and our citizens from receiving, any hereditary title, emolument, privilege or honor. The state constitutions also generally, though unnecessarily, contain a similar pro-

(a) 1 Black. 157; 3 Story Const. 215; Holden v. James, 11 Mass. 396.

hibition: and we have seen that before an alien can be admitted to citizenship, he must renounce every title to nobility. In one word, then, we acknowledge no nobility but that which nature gives; and no distinctions but those which men themselves achieve. But again, equality may be counteracted by *partial legislation*, (a) against which we have no specific prohibition. Probably it was deemed unnecessary to express what was so manifestly implied. An arbitrary government may make partial laws without inconsistency, for it does not profess the doctrine of equality; but in a republic, such laws would be as absurd and inconsistent, as they are odious. Every thing, therefore, in the shape of *monopolies*, is prohibited by the spirit, if not by the letter of the constitution. Let us not, however, carry this doctrine too far. It is not necessary that laws should in all cases include every individual in the community; they will escape the imputation of partiality, if they include all persons similarly situated. The doctrine of equality only requires that they shall not exclude any persons coming within the principle of their operation; and hence it is that our numerous *corporations*, with special privileges and franchises, are not unconstitutional, so long as their charters exclude no class of persons from becoming members.

§ 78. *Corporal liberty.* (b) As a general proposition, every individual, under our government, is at full liberty to go where-soever, or do whatsoever he chooses, provided he does not interfere with the rights of other persons. This may be called his *corporal liberty*, or liberty of action. Again, every individual is at full liberty to adopt and practice such doctrines as he chooses on the subject of religion, provided he does not interfere with the rights of others. This is denominated his *religious liberty*. Lastly, every individual is at full liberty to speak, write, print, or publish, whatsoever he chooses, provided he does not interfere with the rights of others. This is what we understand by the

(a) Municipal law is a *rule*. It is not a mere direction for a particular case, or a transient order to a particular individual, but a standing regulation, operating upon all who come within the principle it establishes. This is the general limit to its extension. It must embrace an entire class, but need not be universal. It cannot single out an individual, for this would be unjust; but neither can it be required to include all the subjects of the government, for this may be sometimes impossible. In *Holden v. James*, 11 Mass. 396, the facts were these. The defendant had been administrator of a certain estate, to which the plaintiff was creditor. The statute of Massachusetts limited actions against administrators to four years from taking out letters. In this case the four years had expired, and the claim was barred. But the plaintiff, thinking his case a hard one, petitioned the legislature to suspend the law of limitation in his particular case. A resolve was passed to that effect; and the question now submitted to the court was, whether the legislature had this power. The court, in a very able opinion, decided, that although the legislature has power to repeal or suspend any law as to *all persons*, it cannot exercise this power with respect to any particular individual. It was manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages, which are denied to all others in like circumstances.

(b) See 1 Black. 134; 2 Kent, 26.

liberty of speech and of the press. I shall consider separately the provisions relating to each of these three branches of liberty, beginning with *corporal liberty*. Individuals can only be deprived of this, in three classes of cases. *First*, by arrest in civil cases; *secondly*, by arrest in criminal cases; and, *thirdly*, by standing towards another in the relation of subjection. With regard to arrest and detention in civil cases, we have already considered that declaration of our state constitution, which secures every one against imprisonment for debt, if he will honestly surrender up his property for the benefit of his creditors. It only remains, therefore, to consider the detention of the person in the other two classes of cases. And, first, with regard to *arrest and detention in criminal cases*, there are numerous declarations tending to secure individuals against all injustice, from the moment of arrest down to the final conviction and punishment. I shall briefly describe these in their order.

Searches and seizures. (a) It is declared by the fourth amendment of the federal constitution, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." There is a similar declaration in our state constitution. The effect is, that no person can be arrested, or his premises searched, without a warrant from the proper authority, issued upon the oath of some individual, and particularly describing the person, place, or offence. In England, prior to 1763, a practice had grown up, of issuing general warrants for the apprehension of suspected persons, or the searching of their premises, without naming them, or describing their offence; whereby great injustice was done to innocent persons. These warrants were decided, in that year, to be against the common law, and were accordingly suppressed. But the apprehension that they might be revived in this country, was a sufficient reason for making this declaration.

Bail. Between the arrest and trial, the accused must either be detained in prison, or held to bail. Our constitution declares that "all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great;" and both constitutions declare "that excessive bail shall not be required." The manner of taking bail will be described hereafter. Suffice it here to say, that these declarations sufficiently secure the liberty of the accused between the arrest and trial.

Confinement in jail. If it should happen that bail cannot be

(a) See 3 Story Const. 748; 4 Black. 291; Ex parte Burford, 3 Cranch, 447; Ex parte Bollman, 4 Cranch, 75; Money v. Leach, 3 Burrows, 1743.

given, then the accused has the benefit of the declaration that "no person arrested or confined in jail, shall be treated with unnecessary rigor." It is accordingly made penal for any officer to oppress or injure any person so situated.

Mode of accusation. (a) The fifth amendment of the federal constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger." Our constitution extends the declaration to every "criminal charge," and makes no exception for martial law, in times of public danger. The two words, *presentment* and *indictment*, mean the same thing in our practice; namely, a formal accusation drawn up by the prosecuting officer, and found to be true by a grand jury, consisting of fifteen impartial persons, acting under oath, of whom twelve at least must concur, before the accused can be put upon his defence; and their deliberations are conducted under an oath of secrecy, in order that, if an indictment be not found, the grounds of suspicion may not be divulged. The result is, that the common law mode of proceeding, by *information*, is here abrogated. This was an accusation filed by the prosecuting officer in his official capacity, upon which the accused was brought to trial, without the intervention of a grand jury. We have already seen that the *impeachment* of officers for official misconduct, requires an accusation to be first made and concurred in by a majority of the house of representatives. So that we are well secured against being brought to trial, in any case, without probable cause.

Trial. (b) Both the federal and state constitutions contain several declarations relating to the trial, in nearly the same words. 1. "In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel." The ancient common law inhumanly denied the right of having counsel in capital cases, though it was permitted in trials for minor offences; but in conformity with the above declaration, both the federal and state courts are required to assign counsel not exceeding two, in all cases when the accused is not able to employ them; and they have access to him in prison at all reasonable hours. 2. "To demand the nature and cause of the accusation against him, and to have a copy thereof." Accordingly, the federal and state laws provide that the accused shall be furnished with a copy of the indictment before the trial. 3. "To meet the witnesses face to face." Accordingly, *written evidence*, by depositions, cannot be used in criminal cases, unless by consent. The accused may always claim the right of hearing the evidence against him from

(a) See Story, 656; 4 Black. 302.

(b) See 4 Black. 355; 3 Story Const. 663; *People v. Smith*, 3 Wheeler's Criminal Cases, 100.

the lips of the witnesses, that their whole bearing and demeanor may be noticed by the jury, and any bias, evasion, or concealment detected. 4. "To have compulsory process for obtaining witnesses in his favor." Anciently, the accused could not even have witnesses examined for him. But the federal and state constitutions not only secure this privilege, but also give him the same means of compelling their attendance, that the government has. The mode of compulsion will be considered hereafter. 5. "To have a speedy public trial, by an impartial jury of the county or district, in which the offence shall have been committed." *First*, the trial shall be speedy. The accused, who is presumed innocent until proved guilty, shall not long be kept in suspense. Accordingly, it is provided that unless there be some strong reason for delay, he may insist upon being tried at the first term after the arrest. *Secondly*, the trial must be public. There can be no star-chamber proceedings. All must be done in the face of day. *Thirdly*, the trial must be by an impartial jury; but the various statutory provisions tending to secure their impartiality, will be considered hereafter. *Fourthly*, the jury must be taken from the county, in trials under the state law; and from the district, in trials under the federal law; unless it appear that a fair trial cannot there be had. Thus the accused is saved the expense of a distant trial, and has the advantage of the good opinion he may have established in his own neighborhood. 6. "Shall not be compelled to give evidence against himself." This does not exclude voluntary confessions, but precludes all resort to torture and the rack, or any other compulsory means, to extort confessions. 7. "Shall not be twice put in jeopardy for the same offence." (a) This is only the affirmation of a great common law right. The meaning is, that a person shall not be tried a second time for any offence, after having been once acquitted or convicted of that same offence, by the verdict of a jury, on which judgment has been pronounced. But if the jury disagree, or a new trial be allowed, or judgment be arrested, the jeopardy here contemplated has not once existed, and another trial may be had.

Punishment. Both the federal and state constitutions declare, that "excessive fines shall not be imposed; nor cruel and unusual punishments inflicted." We have already considered the federal power of punishment, both enumerated and incidental. For the rest, the power of punishment belongs to the states. In either case, however, if fines be imposed, they cannot be excessive; and if any other mode of punishment be provided, it must neither be cruel nor unusual. By *cruel* is here meant barbarous. Death is a cruel punishment; yet death is inflicted in one case under the laws of Ohio, and in nine cases, under the laws of Congress. The declaration then only means that there shall be no unnecessary

(a) See 4 Black. 335; 3 Story Const. 659; *People v. Goodwin*, 18 Johns. 187.

torture or barbarity. And since the punishment cannot be *unusual*, no room is left for the exercise of that horrid kind of ingenuity, which delights itself in devising new modes of punishment. In the same spirit, our state constitution lays down two fundamental propositions; namely, that punishments shall be *mild*, and shall be *proportioned* to the nature of the offence. And when we come to the department of criminal law, we shall find that the pledge here given has been faithfully kept. Probably the world does not furnish a more humane and simple criminal code than that of Ohio. But the proportioning of punishment to the offence has always been a matter of difficulty. No legislature can beforehand so graduate the scale of punishments, as to adapt them exactly to all the varying shades of criminality; and therefore the expedient, adopted both by the federal and state legislatures, is to fix certain limits within which the discretion of the court may range, in apportioning the punishment to the facts of the case. The remaining provisions relating to punishment are found only in the state constitution, and are as follows. *First*, "no person shall be liable to be transported out of this state, for any crime committed within the state." In other words, *banishment* cannot be resorted to as a mode of punishment. *Secondly*, "no person in this state, except such as are employed in the army or navy of the United States, or militia in actual service, shall be subject to corporal punishment under the military law." This declaration is presumed to have grown out of circumstances attending the early settlement of the state; for there could now be little occasion for declaring that citizens who are not soldiers, shall not be subject to martial law; this would seem to follow as a matter of course. I may here add, however, that corporal punishment, by whipping, pillory, and the like, though not prohibited, is now seldom resorted to. There are but two or three instances in the laws of Congress, and none in the laws of this state. *Thirdly*, "no conviction shall work corruption of blood or forfeiture of estate." There is a similar provision by Congress in the act of 1790. It was a barbarous doctrine of the English law, (a) that a conviction of any of the high offences was followed by the two consequences here prohibited; namely, a *corruption* or *attaint* of blood, so that the convict could neither inherit nor transmit inheritance; and a *forfeiture* of his present property. In this way, his innocent kindred suffered for his guilt. But here they can only suffer in their feelings.

Domestic detention. This may happen in consequence of the relation of a minor to his parent or guardian; an idiot or lunatic to his guardian; a wife to her husband; an apprentice to his master; and a slave to his master. The constitutional provisions, however, relate chiefly to *slaves* and *apprentices*; and the pro-

(a) See 4 Black. 381.

visions relating to slaves have been already discussed. Our state constitution contains the following provision in relation to apprentices. "Nor shall any male person arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a *bona fide* consideration received or to be received for their service." This declaration has an imposing sound; but it in fact only affirms the doctrines of the common law. By the common law minors can only be bound until majority; and as to adults, no contract, whether for service or anything else, is binding on them, if made without consideration, or in consequence of duress. The only change then is, that the age of majority is fixed at twenty-one for males, and eighteen for females; whereas by the common law, it was twenty-one for both.

Habeas corpus. (a) I have thus adverted to all the constitutional declarations tending to secure our corporal liberty. Any personal detention contrary to these provisions is unlawful, whether it be in the public streets, in prisons, in private houses, or elsewhere. And now the question arises, how is a person unlawfully detained to recover his liberty? Both the federal and state constitutions declare that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it." By the writ of *habeas corpus* is here meant, that high and imperative writ, which issues as a matter of peremptory right, in favor of any person who is in confinement or detention, in any manner whatsoever, except it be on conviction of some offence, for which his imprisonment is the punishment, as provided in our statute. By virtue of this writ the person so detained is carried at once before a judge to have the cause of his detention investigated; and if it appear to be unlawful, he is immediately set at liberty. No comment can make the importance of this privilege more manifest than the bare statement of what it is. In fact it is universally regarded as the grand bulwark of corporal liberty; and hence the precaution to declare that it shall never be suspended, except in cases of the most overpowering necessity. There is, moreover, in addition to the recovery of liberty, a remedy in damages for the unlawful detention, by an action for *false imprisonment*; but this does not belong to our present discussion.

§ 79. *Religious liberty.* (b) The reason why government ought not to interfere with religion, is, that religion is a matter exclusively between man and his Creator. Yet clear as this proposition is, almost every government in the world, except ours, has made religion a matter of state; until the union of church and

(a) See 3 Story Const. 206; 3 Black. 131; 2 Kent, 26.

(b) 2 Kent, 34.

state had almost become a political axiom. If we take England as an example, we find that a very large portion of laws have relation to her religious establishment. Indeed we owe the first settlement of this country to her interference with the consciences of her subjects. The first colonists came here to enjoy that religious liberty which was denied them at home. And the doctrine for which they sacrificed so much, is now incorporated into all our constitutions. The federal constitution, in the first amendment, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" and in another place, that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Our state constitution contains a still more full and emphatic declaration, in these words:—"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given, by law, to any religious society or mode of worship, and no religious test shall be required as a qualification to any office of trust or profit." The result is, that we enjoy an entire freedom of conscience in religious matters; and that we have very few legislative provisions in any way connected with religion. We have seen that in the first two sales of land by the federal government, within the state, one section in each township was set apart for the support of religion; a thing which has not been done since the adoption of the federal constitution. This occasioned another declaration in our constitution, securing to all religious denominations an equal participation in the profits of these lands, according to their numbers; and there are some legislative provisions relating to the management of these lands. But with these exceptions, the only provisions we have, in any way connected with religion, are those which prohibit the disturbing of religious societies when met for the purpose of worship, and which secure to such societies a perpetuity in their lands used for church purposes, without a specific act of incorporation.

§ 80. *Liberty of speech and of the press.* (a) It has been well remarked, that there is little danger from error of opinion, when there is a free opportunity to expose and correct it by speech, and by the press. This, then, is one motive for securing this branch of liberty. And another is, to insure the accountability of public agents. Public opinion is the tribunal before which a corrupt or unfaithful officer most fears to be arraigned;

(a) See 3 Story Const. 731; 2 Kent, 19; 4 Black. 151; Starkie on Slander; Holt on Libel.

but the efficiency of this restraint depends chiefly upon the freedom with which every one is allowed to express his opinions on public affairs. Without adverting, therefore, to the high considerations growing out of the sacredness of the right, abstractly viewed, we find in expediency alone a sufficient reason for securing to opinion the utmost freedom, both as to its formation and expression. Accordingly, the federal constitution, in the first amendment, declares that "Congress shall make no law abridging the freedom of speech or of the press." Our state constitution is much more diffuse in its language. It begins by declaring that "the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of government, or the conduct of any public officer; and no law shall ever restrain the right thereof." It is doubtful what is the precise intent of this language. If it means that the proprietor of a press shall not have the liberty of refusing to publish communications on public affairs, it is absurd; and if it does not mean this, then it is merged in the next clause, which asserts the true doctrine in this strong language; "That every citizen has an indisputable right to speak, write, or print upon any subject, being liable for the abuse of that liberty." This qualification is tacitly annexed to every species of civil liberty. They who abuse it are held liable for the injury resulting from such abuse. It was well, however, to guard the above declaration against the possibility of cavil. The doctrine then is, that the liberty of speech and of the press consists in freedom from previous censorship or restraint, and not in exemption from subsequent liability for the injury which may thereby be done. And accordingly the law makes provision, by which the person injured may have his civil action of *slander* or *libel*, to recover damages for the injury done to his reputation; and by which the libeller may be criminally prosecuted as an offender against the public peace. Again it is declared that "in prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information, the truth thereof may always be given in evidence." The common law doctrine is, that in a civil action, either for verbal or written slander, the truth may always be given in evidence; but on an indictment for a libel, never; because the criminality of a libel consists in its tendency to disturb the public peace, which tendency would be the same, whether the libel were true or false. And this agrees with our statutory definition of a libel, which requires it to be "false or malicious." This provision, therefore, alters the common law only when the libel applies to public men or measures. In such cases the truth may be given in evidence; but in other cases it is no justification. This distinction is rational and well founded. The truth ought to be published, when it concerns the public to know it; but private matters, even though true, ought not to be

made public, in order to disgrace private individuals. Lastly, it is declared that "in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." This provision is sometimes cited to prove that in criminal cases, generally, the jury are made the judges of law as well as fact. If such were its meaning, it would be both absurd and pernicious. But in fact it means nothing. The phrase, "under the direction of the court," makes the court the judge of the law, "as in other cases." It is true that the jury cannot be compelled to render a *special verdict*, finding only the facts, in any case; but if, in rendering a *general verdict*, they act in opposition to "the direction of the court," their verdict will be set aside. This will be more fully explained hereafter.

In the mean time it is proper to remark, that the true nature of that liberty and equality which we have now been considering, is often mistaken or misrepresented. We have seen that civil liberty is liberty protected and restrained by law; and that social equality is only an equality of rights and obligations, as determined by law. In this view both are so mutually dependent upon each other, that neither can exist without the other. But this is true only of liberty and equality as above defined; for an absolute equality of condition is incompatible with any degree of liberty. What is it to be born free, and to live free, but to have the capability of carving out our own particular fortunes for ourselves, and thus differing indefinitely from those around us? It would require more than a Nero's despotism to reduce all men to a strict level, and keep them there. Even the most abject of slaves will differ in condition. Inequality of condition, therefore, is the natural offspring of civil liberty and equality of rights. But how often has this great truth been lost sight of! We need not go to the ostracisms, the persecutions, and the banishments of ancient Greece or Rome, for examples. We need not even go so far back as the reign of terror in France, when the guillotine was employed, in the name of liberty, to bring about an absolute equality. We may find alarming indications of the same spirit at home. Under the magic name of equality, the doctrines of agrarianism are beginning to be openly avowed; and unprincipled demagogues are industriously sowing the seeds of jealousy and disaffection between the rich and the poor, the intelligent and the ignorant, the illustrious and the obscure. These distinctions they would abolish, not by the regular results of free and generous competition, but by the combined force of numbers trampling down superiority. And liberty has been perverted in a similar manner. The people are told that their voice is the voice of God; in their self-love they take this hackneyed saying literally; and what then is the majesty of law, if it happen to stand in the way of their capricious will! There can be but

one earthly supremacy; and if this is to be found in the fitful ebullitions of popular feeling, the boasted supremacy of law becomes a mere name. This position is too clear for argument. If the people are to rise against their own laws, and suicidally trample them under foot, and if public opinion is to sustain them in so doing, there can be no such thing as security; for we shall hold our rights at the mercy of a mob, of all tyrants the most arbitrary and inexorable: and the signs of mob rule have of late been fearfully multiplying, both in theory and practice. Doctrines have been advanced in high places which clearly sanction popular violence against obnoxious laws; and in almost every quarter of the country practice has followed precept, and the laws have been tumultuously set at defiance. These things may well excite alarm in every patriotic bosom. If a determined stand be not taken, by the friends of order, against these tendencies towards the subversion of order, the most fearful convulsions may well be apprehended. Let it never be forgotten, that the sole tenure by which we hold our rights, is, the absolute and unquestioned supremacy of the law. This must be maintained, and insubordination prevented, at all hazards. The mob must be kept down, cost what it may: otherwise the days of free government are numbered. Here is our Rubicon, and it must not be crossed.

§ 81. *Right of property.* We have seen that "the right of acquiring, possessing, and protecting property," is set down in our constitution among "the natural, inherent, and unalienable rights." Whether it be so or not, is a matter of speculation, upon which I shall not waste time. It is enough for us, that the right of property exists under the social compact, and that the protection and regulation of it forms a leading object of municipal law. Property, as we have seen, is either in possession or in expectation, and the declarations now to be discussed relate to both descriptions of property, with a view to secure its inviolability by government.

Property in possession. (a) The language of the ordinance of

(a) See 3 Story Const. 612; 2 Kent, 338; 1 West. Law Jour. 371; *Bates v. Cooper*, 5 Ohio, 115; *Willyard v. Hamilton*, 7 Ohio, part 2, 111; *Cooper v. Williams*, 4 Ohio, 253; *Cooper v. Warren Canal Co.* 7 Ohio, 242; *Parks v. Boston*, 15 Pick. 207; *Schuylkill Co. v. Thobarn*, 7 Serg. and R. 422; the matter of Albany street, 11 Wend. 153; the matter of Forman street, 17 Wend. 670; *Gardner v. Newburgh*, 2 Johns. Chy. Rep. 162; *Beekman v. Saratoga Rail Road Company*, 3 Paige, 45; *Rogers v. Bradshaw*, 20 Johns. 735; *McArthur v. Kelly*, 5 Ohio, 139. In *Gardner v. Trustees of Newburgh*, 2 Johns. Chy. Rep. 162, the facts were these. Gardner owned a farm through which a stream flowed, which he used for various valuable purposes. The stream issued from a spring on his neighbor's farm. The legislature authorized the trustees to take water from the spring in pipes for the use of the town of Newburgh, but made no provision for making up to Gardner the loss he would sustain by diverting the water. *Held* that he was entitled to a fair compensation before the water could be diverted; and as the law made no provision therefor, an injunction was granted. In *Rogers v. Bradshaw*, 20 Johns. Rep. 735, the facts were these. The legislature of New York authorized the canal commissioners to take

1787 is:—"Should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, *full compensation* shall be made for the same." The language of the federal constitution is:—"Nor shall private property be taken for public use without *just compensation*." The language of our state constitution is:—"Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a *compensation*

lands necessary for the canal. It became necessary to use the turnpike track for the canal, and to construct a new turnpike on Bradshaw's land. He brought trespass. *Held* that trespass would not lie. Bradshaw was entitled to compensation; but as his land was necessary for the new road, which was rendered necessary by the canal, the commissioners were not trespassers. A turnpike is a public road. *Dictum*, that even though an act taking private property for public uses, makes no provision for compensation, it still shields the persons entering from liability as trespassers. And see 2 Kent Com. 3d ed. 339, note. In *Beekman v. Saratoga Rail Road Company*, 3 Paige, 45, the facts were these. The company had projected the rail road over Beekman's land, the only convenient place. He had refused his consent, and would make no agreement for compensation. Pursuant to the charter, the governor had appointed commissioners, who had appraised damages, and the amount was deposited in bank for Beekman, who had notice of the fact. He applied for an injunction, which was refused, *Held*, that a rail road was a public use, if the legislature chose so to consider it, for which private property might be taken. That the government might exercise the right of eminent domain through a private corporation. That the charter must provide a fair mode of ascertaining the compensation, but it need not be a jury, since the constitutional guaranty of a right to a trial by jury relates only to the trial of issues of fact in civil and criminal cases in courts of justice. In *Cooper v. Williams*, 4 Ohio, R. 253, the facts were these. The law authorizing the construction of the Ohio canal, empowers the commissioners to take any land, water, or materials necessary; and if application be made within one year for compensation, they are to appoint three or five appraisers to assess damages, deducting benefits, which award the commissioners are to pay. Cooper owned land on Mad River commanding a large water power, part of which he was using. The canal commissioners constructed a dam above him, and a feeder, by which they took out three thousand cubic feet per minute, which greatly diminished the water power Cooper might use on his land. This quantity was necessary to supply the canal. On its transit, two thirds could be used as water power, which the commissioners proposed to sell for the use of the state. Cooper applied for an injunction, which was refused. *Held*, that Cooper was entitled to compensation for any of his land taken, or for any loss of the use of water flowing by or through his land. But he had no such right in the water of Mad River, that the state might not take so much of it as the canal required, making compensation. And having taken it, the state might use it in its transit, or sell the use of it. The same was affirmed in *Cooper v. Williams*, 5 Ohio R. 391. In *Bates v. Cooper*, 5 Ohio R. 115, the direct question of the constitutionality of the canal laws as to taking private property was presented, and their constitutionality sustained. The intimation is, that it is sufficient, if the law provide some equitable mode of ascertaining compensation, without requiring it to be assessed and paid over before proceeding with the work. In *McArthur v. Kelley*, 5 Ohio R. 139, the whole subject of jury trials is very fully considered. The particular point decided is, that, as our constitution requires the compensation to be in money, the legislature cannot authorize the canal commissioners to compensate one man for the injury he will sustain in his water power, by constructing a mill race on the land of another man. In *Young v. Buckingham*, 5 Ohio, 485, the legislature authorized the erection of a toll bridge over the Muskingum, providing that damages should be estimated by three commissioners appointed by the court of common pleas. Only two of the commissioners concurred in the award. *Held*, that a toll bridge is a public use, for which private property may be taken; and that the award of the majority of the commissioners is sufficient.

in money be made to the owner." These declarations assert two great principles. First, the private right of an individual must yield to the *eminent domain* of government, whenever the public good requires it. And this is well; for otherwise it would be in the power of one obstinate owner to prevent the execution of any of those great public improvements, which contribute so much to the general convenience and happiness. Secondly, to equalize the burthen and avoid all hardship, the owner of property so taken is to receive a compensation, which shall be full, just, and in money. Any law, therefore, which should condemn private property for any other than a public use, or which should not provide for such a compensation, would be unconstitutional. One question which has arisen under these provisions is, whether the compensation must be paid before the property is taken? The answer is, that if a law authorizing property to be taken, provide an equitable mode of ascertaining the compensation, and direct it to be paid, the law is valid; but in any given case, if the owner of property can make it appear that his compensation would be doubtful or improbable, he may obtain an injunction against taking the property until the compensation has been secured. Another question is, whether benefits are to be taken into view in fixing the amount of compensation? Upon this question there has been much contrariety of opinion. There is an obvious distinction to be made between paying for property actually taken, and paying for consequential injury where property is not taken. To the latter case the constitutional provisions do not apply. It is a mere question of damages; and as there can be no actual damages where the benefit exceeds the injury, there is no doubt that benefits may be properly offset against consequential injuries. But can benefits be offset against the value of the property actually taken? In this state, where the compensation is to be "*in money*," the answer must undoubtedly be in the negative; for the benefits derived from the vicinity of a public improvement, however great, are not literally money. But how is it, where the compensation is only required to be "*just*" or "*full*," without specifying money? Can benefits there be offset against property? It would seem they cannot; for while many share in the benefits of any great public work, besides those whose property is taken for its construction, this rule would make the burthen fall wholly on the latter class, which would be *unjust*. It may be said, however, that when a man is not made absolutely poorer, by taking part of his property, no injury is done to him. But the answer is, that relatively he is made poorer, by so much as the property is worth, because his neighbors, whose property is not taken, share equally in the benefits. On the whole, then, the rule would seem to be, that property actually taken for public uses must be paid for, without reference to benefits, which can only be offset against consequential dam-

ages. Still another question is, whether the amount of compensation must be determined by a jury of twelve persons? It has been decided that any fair and equitable mode will be sufficient, as by disinterested appraisers or commissioners. As to what are public uses, it has been held that canals, turnpikes, rail roads, toll bridges, supplies of water for a town, and the like, are public uses; and that the legislature may exercise its right of appropriating private property for such uses through private corporations.

Property in expectation—Contracts. (a) Property in expect-

(a) See *Mad. Pap.* 1443, 1444, 1581; 1 *Kent*, 413; 3 *Story Const.* 240: 9 *Dane Abr. App.* 77; *Fletcher v. Peck*, 6 *Cranch*, 87; *New Jersey v. Wilson*, 7 *Cranch*, 164; *Terret v. Taylor*, 9 *Cranch*, 43; *Dartmouth College v. Woodward*, 4 *Wheat.* 518; *Sturges v. Crowninshield*, 4 *Wheat.* 122; *M'Millan v. M'Neill*, 4 *Wheat.* 209; *Green v. Biddle*, 8 *Wheat.* 1; *Ogden v. Saunders*, 12 *Wheat.* 213; *Blanchard v. Russell*, 13 *Mass.* 1; *Mather v. Bush*, 16 *Johns.* 233; *Smith v. Parsons*, 1 *Ohio*, 236; *Charles River Bridge v. Warren Bridge*, 11 *Peters*, 421; *Bronson v. Kinzie*, 1 *Howard*, 311. In *Fletcher v. Peck*, 6 *Cranch*, 87, the facts were these. In 1795, Georgia passed an act authorizing the sale of a large tract of wild land; in pursuance of which, a grant was regularly made by patent, to the Georgia Company. *Fletcher* held a deed from *Peck* for a part of this land under a title derived from the patent, in which deed *Peck* had covenanted that the title conveyed by the patent was good and valid when the patent was made, and had not since been impaired. The fact was, that in 1796, Georgia had passed another act, declaring the preceding act and all conveyances under it to be null and void. The pretence was, that the first act was collusively procured by bribing members of the legislature. *Fletcher*, therefore, brought an action of covenant against *Peck*, and assigned as a breach, that the patent was void by the effect of the act of 1796. This brought up the question, whether the legislature of Georgia could constitutionally repeal the act of 1795, and make void the proceedings under it? Chief Justice Marshall pronounced the decision of the court. He said they could not go into an inquiry respecting the corruption of the sovereign power of the state; nor was it necessary. For admitting the original transaction to have been infected with fraud, the parties to this suit did not participate in it, and had no notice of it. Yet if the act of 1795 be in fact repealed, their rights, innocently acquired under it, are annihilated. Had Georgia power then to repeal this act? She had not. The act was a grant to which Georgia was a party. A grant is a contract executed. In its own nature it is an extinguishment of the right of the grantor, and implies a contract not to reassert that right. Such a contract Georgia had made, and rights had become vested under it. Could the legislature afterwards pass a law impairing its obligation? Certainly not; for a contract by a state is as much protected by the constitution, as a contract by an individual. The principle therefore established by this case may be thus stated. A grant is a contract, the obligation of which cannot be impaired; and it makes no difference whether the state or an individual was a party to the grant. In *New Jersey v. Wilson*, 7 *Cranch*, 164, the facts were these. In 1758, New Jersey passed a law declaring that certain lands to be purchased for the use of the Indians should not thereafter be subject to any tax. The Indians occupied these lands until 1803, when they were sold to individuals by authority of the legislature; but nothing was said, in the authority to sell, respecting the former exemption from taxation. In 1804, a law was passed repealing the law of 1758, which exempted the lands from taxes, and they were accordingly assessed. This brought in question the validity of the law of 1804. It had already been decided in *Fletcher v. Peck*, that the prohibition in the constitution extended to contracts to which a state was a party, as well as to contracts between individuals. In this case, therefore, the inquiry was narrowed down to the question, whether the foregoing facts amounted to a contract, which was violated by the act of 1804? The court decided that the transaction between New Jersey and the Indians, had every requisite of a contract. The exemption from taxation made the lands more valuable, and they were sold by the Indians with this privilege annexed.

tation, as we have seen, consists chiefly of *contracts*. Without here stating the requisites of a valid contract, it is sufficient to say

The state in authorizing the sale by the Indians, might have stipulated for a surrender of this privilege, but did not. The purchasers therefore took the land with the privilege annexed, and the state could not afterwards take it away without impairing the obligation of their contract with the Indians. This case, then, may be considered as merely a reiteration of the doctrine of *Fletcher v. Peck*. In *Terrett v. Taylor*, 9 Cranch, 43, the facts were these. At a very early period, the *Episcopal Church*, and the common law relating thereto, were recognized in Virginia; and from 1661 to 1788 a variety of laws were passed enabling the church by its proper officers to hold lands and other property. In 1770, the Episcopal Church of Alexandria purchased, in due form of law, the land which was now the subject of dispute. Their right so to do was never doubted until 1793, when a law was passed repealing all preceding laws on the subject of the church. In 1801 another law was passed, asserting the right of the state to all the property of the Episcopal Churches, and directing it to be taken for the support of the poor. The pretext was, that all the laws protective of the church were inconsistent with the principles of the constitution relating to religious liberty. On these facts, the question was referred to the supreme court, whether the laws of 1793 and 1801 were constitutional. The court decided that they were not. Be the authority of the legislature on the subject of religion what it might, they had authorized the church to purchase these lands. The revolution, though its effect was to deprive the Episcopal Church of its character of an exclusive religious establishment, could not divest them of the property which was before vested in them; for even the division of an empire creates no forfeiture of previously vested rights of property. Nor did the fact of being a corporation make any difference. The legislature may indeed change and modify *public corporations*, such as counties and towns, which exist only for public purposes; though even then the rights of property must be secured to those for whose use and at whose expense it was purchased. But the legislature cannot repeal statutes creating *private corporations*, or confirming to them property acquired under the faith of previous laws; and by such repeal vest the property in the state, or dispose of it without the consent of the corporators. Against such legislation, private corporations are as much protected as individuals, by the spirit and letter of the constitution. This is a sketch of the reasoning of Judge Story, who delivered the opinion of the court. In *Dartmouth College v. Woodward*, 4 Wheaton, 518, the facts were these. In 1769, the British crown granted a charter to the *Trustees of Dartmouth College*. Under this charter a large amount of property was acquired, and the affairs of the college were prosperously administered until 1816; when the legislature of New-Hampshire passed a law, enlarging the number of trustees, varying the mode of appointment, placing over them a board of overseers, and making other important alterations in the charter. The old trustees met and resolved not to accept the provisions of this act. The new corporation, under the name of *Trustees of Dartmouth University*, commenced operation, by taking possession of all that belonged to the college. The old trustees contested their right in an action of trover against the treasurer, to recover the books, papers, and title deeds which had been taken from them. The question raised upon these facts was, whether the law of 1816 came within the prohibition of the constitution against impairing the obligation of contracts? And a more important question was never brought before a court. The safety of all chartered rights was staked upon the decision. The state court decided in favor of the law. But the federal court declared the law unconstitutional. They said if this had been a public corporation, with political privileges, or if the funds had been public property, the state might have legislated as it pleased. But this corporation was a private one, in its foundation and endowed with private funds, though for public and benevolent purposes. These funds had been contributed, and trustees had taken charge of them, upon faith in the permanency of the charter. The crown by granting the charter, had contracted with the donors and trustees that so long as the provisions of the charter were complied with, it should not be withdrawn or impaired. At the revolution, New Hampshire had become a party to this contract in place of the crown. And though Parliament, in its omnipotence, might have violated this charter, the legislature of New

that it differs from a mere promise made without consideration, chiefly in this; that there is only a *moral obligation* to perform a promise, while there is a *legal obligation* to perform a contract. And it is this legal obligation which gives such value to a contract, as to entitle it to be considered as property. But this value would be greatly diminished, if it were left in the power of legislation to impair the obligation upon which it depends; and hence the importance of a constitutional guaranty against impairing the obligation of contracts. The ordinance of 1787, contained this declaration:—"And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever, interfere with, or affect private contracts or engagements, *bona fide*, and without fraud, previously formed." This was the first time that such a provision ever formed part of a declaration of rights. But so universal is the conviction of its vast importance, that it has been inserted in every American constitution since formed. In the federal constitution, the declaration is, that "no state shall pass any law impairing the obligation of contracts;" in our state constitution, that "no law impairing the validity of contracts, shall ever be made." So far, then, as respects state legislation, we are doubly protected. Why Congress was not placed under a like prohibition, I do not under-

Hampshire cannot, in consequence of the constitutional limitation of its powers. In fine, the charter is a contract, the obligations of which would be impaired by enforcing the law of 1816. The law, therefore, is void. In *Greene v. Biddle*, 8 Wheaton, 1, the facts were these. In the compact between Virginia and Kentucky, in 1789, prior to the admission of the latter into the Union, it was stipulated that all private rights and interests in lands, derived from the laws of Virginia before the separation, should remain valid and secure after the separation, and should be determined by the then existing laws of Virginia. This compact was made a part of the constitution of Kentucky, and thus became a compact between two sovereign states, with the assent of Congress. By the law of Virginia, as it then stood, the claimant of lands, who succeeds in his suit, was entitled to receive *mesne profits* from the occupant. But in 1797, and 1812, Kentucky had enacted laws concerning *occupying claimants*, which, however intrinsically just and equitable, materially affected the interest of the non-occupying claimants, as they would have been under the laws of Virginia; for the object of those laws was, to compel the rightful owner either to relinquish the lands to the occupant, or pay for all improvements made upon them, without his consent or default; and no possession could be obtained without complying with these requisitions. In the present case, Greene's title accrued prior to the separation, and he claimed to have his rights decided pursuant to the compact. This brought in question the validity of the laws of Kentucky, and the supreme court decided that they were unconstitutional. They said that the constitution as much embraced compacts between sovereign states, as contracts between individuals. A compact did not differ from a contract. It was an agreement to do, or not to do, some particular thing. In this compact Kentucky had agreed that the rights of claimants to lands should be determined by the laws of Virginia; and having so agreed, could pass no laws to impair that agreement. But the laws now in question did impair the obligation of that agreement; to what extent was not material. Any deviation from the terms of a contract, by postponing or accelerating the period of performance, imposing terms not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

stand. It will be observed that the ordinance expressly limits the prohibition to *prior contracts*; and this is the construction put upon the language of the constitution. Indeed, if the law be made before the contract, it forms a part of its obligation, and cannot be said to impair it. The design was to protect existing contracts from *retroactive legislation*; and the effect is, that when a valid contract is once made, no future state legislation can impair its validity. The provision has been frequently the subject of judicial construction, and the following points have been decided. 1. A grant of land, which is an executed contract, is within the prohibition, and it makes no difference whether a state or an individual made the grant. 2. A charter creating a private corporation is a contract within the prohibition; and so is a compact between two states; but a charter creating a public corporation is not. 3. The extent to which the contract is affected is of no consequence, for if any of its terms be varied, its obligation is impaired. 4. The prohibition supposes the *parties* to the contract, to belong to the state which passes the law affecting it, otherwise the law cannot be said to impair it. 5. With these qualifications, it may be stated generally, that statutes of usury which affect the validity of contracts; statutes of fraud, which affect the evidence of contracts; and statutes of limitation and bankruptcy, which affect the remedy of contracts; are all within the meaning of the prohibition.

§ 82. *Right of petition and instruction.* (a) The right of *suffrage*, through which the people indicate their wishes in the choice of *men* to make their laws, has already been considered. But when the proper men have been selected, their constituents may desire from time to time, to make known their wishes as to *measures*. Accordingly, the first amendment of the federal constitution declares that "Congress shall make no law abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Our state constitution goes still further. It declares that "the people have a right to assemble together in a peaceable manner, to consult for their common good; to instruct their representatives; and to apply to the legislature for redress of grievances." The reason for thus solemnly asserting principles so self-evident, probably was, that in England, where the government is less democratic, several restrictions were laid upon the exercise of these rights. The provision contains three points for consideration. 1. The right of *assembling* for consultation. The only qualification is, that the assembling must be *peaceable*, and not riotous. 2. The right of *petitioning* for redress of grievances. Our constitution uses the word "apply," perhaps because the tone of petition is not the

(a) 1 Black. 143. 3 Story Const. 745.

one in which masters usually address their servants. But when only one or a few make the application, there is not even this seeming impropriety. Correlative to this right of the people to petition, is the obligation of the legislature to receive and consider their petitions. If, however, a petition be disrespectful in its language, or demand something manifestly frivolous or wrong, a legislature does not hesitate to reject it as soon as presented. 3. The right of *instructing* representatives. There was no occasion to assert this in the federal constitution, and it is therefore omitted. Was it necessary to assert it in the state constitution? Would the omission of it have released the representative from his corresponding obligation to obey instructions? In some of the states, these are important questions. And it is argued with some plausibility, that the omission by the people to reserve the right in their constitution, operates as a relinquishment of it. The people, it is said, by their constitution, have given their representatives a set of general and permanent instructions. They might unquestionably, at the same time, have stipulated for the right of giving future instructions for particular emergencies; but not having done so, they have agreed that their representatives shall be bound only by the instructions in the constitution. And this reasoning derives countenance from the fact, that several of the constitutions, like that of Ohio, take care to reserve to the people the right of instruction. On the other hand, it is contended that the right of instruction flows so directly from the relation of constituent and representative, that it requires no assertion. But as the question cannot arise here, I shall not attempt to settle it. The people of Ohio have reserved the right to instruct their representatives, and of course the representatives are bound to obey. But whether it is expedient frequently to exercise the right, and thus far convert the representative into an *automaton*, may well admit of serious doubt. If we take into view the abundant safeguards against the abuse of discretion by the representatives; the evils of party excitement; the difficulty of ascertaining the aggregate will of the constituents, in any authentic shape; and the superior advantage which the representative has to inform his judgment from being on the spot, we shall probably arrive at the conclusion, that the right of instruction should only be exercised in extreme cases. This question has lately assumed a new aspect. State legislatures have undertaken to instruct federal senators, because they elect them. Have they this right? They are not the people, and do not therefore come within the letter of the declaration. Nor is this right derived by implication, from their legislative functions, for it has nothing to do with legislation. It would seem, therefore, that their instructions are not obligatory upon federal senators. The people of the states may instruct them, but not the state legislatures.

§ 83. *Security against retroactive laws.* (a) There can be but one opinion as to the injustice of retroactive laws. It is a

(a) See *Mad. Pap.* 1400, 1444, 1450; *Gilmore v. Shuter*, 2 *Levinz*, 227; *Couch v. Jefferies*, 4 *Burrows*, 2460; *Call v. Hagger*, 8 *Mass. Rep.* 423; *Dash v. Van Kleeck*, 7 *Johnson*, 477; *Calder v. Bull*, 3 *Dallas*, 386; *Fletcher v. Peck*, 6 *Cranch*, 87; *M'Cormick v. Alexander*, 2 *Ohio Rep.* 65; *Ogden v. Blacklege*, 2 *Cranch*, 194; *Society, &c. v. Wheeler*, 2 *Gallison*, 105; *Satterlee v. Matthewson*, 2 *Peters*, 380. In *Gilmore v. Shuter*, 2 *Lev.* 227, the question was whether the statute of frauds should be construed to act upon parol contracts entered into before its passage. And even then, in the reign of Charles the Second, the judges held that to give the statute such a construction would make it repugnant to common justice. In *Couch v. Jefferies*, 4 *Bur.* 2460, Lord Mansfield held the same doctrine. He said it could never be the true construction of the act then in question to include prior cases. In *Call v. Hagger*, 8 *Mass.* 423, where a statute of limitations did not expressly extend to prior transactions, the court refused to give it that extent by construction. In *Calder v. Bull*, 3 *Dallas*, 386, the facts were briefly these. The probate court of Hartford, upon hearing, had set aside a will, the effect of which decree was to let in the heirs. By the law of Connecticut, as it then stood, no appeal could be had from this decree after eighteen months. But when this limitation had run out, the legislature passed a law setting aside the former decree, and authorizing a rehearing by the same court of probate, and an appeal therefrom; the result of which was that the will was finally established. The heirs, who by this means were deprived of their inheritance, brought the question before the supreme court, on the ground that the law in question, was an *ex post facto law*. The court decided that it was not an *ex post facto law*, in the meaning of the constitution, and this is the only point actually decided, because it was the only question before the court. But occasion was taken to give a construction to this clause of the constitution which has ever since been acquiesced in. They said the prohibition related only to laws for the punishment of crimes; and its meaning was this;—"That the legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it." And they considered that the following would be *ex post facto* laws within the words and intent of the prohibition. 1. Every law that makes an action, done before the passing of the law, and which was *innocent* when done, criminal; 2. Every law that aggravates a crime or the punishment thereof, after the crime is committed. 3. Every law that alters the legal rules of evidence, and receives less, or other testimony, than was required at the time of the commission of the offence, in order to conviction. These three classes may be reduced to one, namely, all laws which make an act punishable in a manner in which it was not punishable when committed. But the court did not consider any law *ex post facto*, within the prohibition which *mollified the rigor* of the criminal law. They said there was a difference between making an unlawful act lawful; and making an innocent act criminal. I have been thus particular in giving an account of this case, because it has often been cited as an authority on the subject of retroactive laws in general, as well as of legislation for individual cases. In *M'Cormick v. Alexander*, 2 *Ohio*, 65, the facts were these. Evans had obtained a judgment and taken out execution within the time required by the law as it then stood, in order to secure his *lien*, in preference to that of one M'Cormick, who had obtained a subsequent judgment. Had the law, therefore, remained unaltered, the right of Evans to the property levied upon, would have been *completely* vested, as against M'Cormick. But in the mean time, a law was passed, providing, "that no judgment *heretofore* rendered, or which *hereafter* may be rendered, on which execution shall not have been taken out and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien upon the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor." The effect of this law was to set the right of Evans aside, and prefer that of M'Cormick, for the execution of Evans had not been levied within a year from the judgment, and that of M'Cormick had. It was no question of construction, for the statute was expressly made retroactive, including prior, as well as subsequent judgments. And the court upheld the law as constitutional, although very unjust and unequal in its operation, and interfering with vested rights. They said, the

necessary maxim, that ignorance of the law forms no excuse for violating it; because, otherwise, every transgressor would set up the plea of ignorance. When laws are prospective in their provisions, and are promulgated before they take effect, there is no hardship in this maxim; for it is at least possible to know them. But when they are made to act backwards upon that which transpired before their existence, this maxim becomes inhuman; since it holds men responsible for knowing what they could not possibly have known. Again, retroactive laws are as absurd as they are unjust. The design of a law is to *regulate* conduct; that is, to fix a rule for it; and the idea of regulating past conduct involves an absurdity in terms. You may attach a new consequence to a past transaction, but this is not regulating it; for that which is past, is beyond regulation. It cannot be altered, recalled or avoided; and therefore, ought not to be legislated upon. Give a legislature power to pass retroactive laws, and no one can be safe; since his whole past life is liable to be animadverted upon. For such reasons as these, it is obvious that retroactive laws are

right vested in Evans was not one acquired by contract or agreement; if it had been the legislature could not have deprived him of it, because the constitution protected him. But the lien of a judgment was given him purely by legislative enactment, and the same power which gave, had taken away. In so doing, they had not exceeded the authority given them under the constitution. Arguments drawn from the injustice of the act, must be addressed to the legislature, and not to the court. In *Society, &c. v. Wheeler*, 2 Gallison, 105, Judge Story is often quoted as deciding against retroactive laws in general. But the truth is, he was then construing the constitution of New Hampshire, which contains an express prohibition of *retrospective* laws generally, in these words:—"Retrospective laws are highly injurious, oppressive, and unjust. No such laws therefore should be made, either for the decision of civil causes, or the punishment of offences." All therefore that Judge Story decided was "that every statute, which takes away, or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective," *within this prohibition*. But inasmuch as we have no such prohibition in Ohio, this decision has no authority here. In *Ogden v. Blacklege*, 2 Cranch, 194, the only real difficulty occurs. There was a law of 1715 in North Carolina, limiting the time of producing claims against deceased persons to seven years. This law was repealed in 1789, and a suit was in consequence commenced by a creditor, after the former limitation had expired; he now having a legal right to sue. But a law was afterwards passed, declaring that the law of 1789 did not repeal this part of the law of 1715. The effect of this law, supposing it constitutional, was to restore the limitation, and so defeat the suit in question. But the supreme court sustained the suit, and thus virtually set aside the last law. No reasons are given in the meagre report to show the want of power to pass such a law, and we are left entirely in doubt as to how far the decision intended to go, or what were its grounds. Under these circumstances, I think very little importance is to be ascribed to the case. And so said Judge Spencer in his opinion in the case of *Dash v. Van Kleeck*, 7 Johns, 477. He did not feel bound by a decision, not only at variance with the opinion expressed by the same court in the anterior case of *Calder v. Bull*, "but so utterly destitute of reasoning or authority to support it." On the whole, then, I leave this subject with the remark, that however revolting to our sentiments of justice retroactive laws may be, it seems clear from the foregoing authorities, that apart from the express prohibitions of the constitution as already explained, our only safeguard against them, is to be found in the good sense and right feelings of our legislators.

fit only for tyrants to make, and slaves to submit to. Accordingly some of the state constitutions contain a general prohibition of retroactive laws; and it is to be regretted that any should have omitted such a prohibition. But the federal constitution and the constitution of Ohio, only prohibit three classes of retroactive laws; namely, "*ex post facto laws*," "*bills of attainder*," and "*laws impairing the obligation of contracts*." And the specific prohibition of these, is so far held to sanction others, that though a court will never construe a law to be retroactive, which is not made so in its terms; yet if expressly made retroactive, a court will not declare it void, on the ground of injustice, unless it comes within one of the above classes. The consequence is that we are safe against retroactive laws, only in the three cases above prohibited. I have already spoken of *laws impairing the obligation of contracts*. It therefore only remains that I describe the other two. 1. *Ex post facto laws*. (a) These have been decided to mean *retroactive criminal laws*, and no other. The prohibition extends to every law which makes an act punishable in a mode or measure in which it was not punishable, when the act was committed, unless it be to diminish the punishment. With this exception, criminal laws can only operate upon future acts. Men may be benefited, but shall not be injured by laws which did not exist when the act was done. We are safe, therefore, against retroactive criminal laws. 2. *Bills of attainder*. (b) A bill of attainder is a special legislative act, inflicting punishment for an offence already committed, without a conviction in the ordinary course of justice. It may take life, or confiscate property, or both. It has therefore the double enormity of being an *ex post facto* law, and an usurpation of judicial power. The bloodiest pages of English history, are those which record the inhuman exercise of this fearful power. No wonder then that it is universally prohibited in this country.

§ 84. *Security against the suspension of laws*. Our state constitution declares that "no power of suspending laws shall be exercised, unless by the legislature." Perhaps it may be asked, what other power than the legislature could suspend laws? None certainly, without usurpation. The power to suspend a law, is the same as the power to make it; for one law can only be suspended by making another to suspend it. Hence the exception in favor of the legislature. The provision, therefore, must have contemplated a very remote possibility of usurpation by the executive, judicial, or military departments. We have seen that there is one law, securing the privilege of the writ of habeas corpus, which cannot be suspended even by the legislature, unless in the extreme emergencies of rebellion or invasion.

(a) See the case of *Calder v. Bull*, in the preceding note; *Mad. Pap.* 1399—1400.

(b) See 2 *Black.* 251; 4 *Black.* 381; 3 *Story Const.* 209; *Mad. Pap.* 1400.

§ 85. *Right of education.* Were it not that in times past, knowledge, more than any other of heaven's gifts, has been monopolized by the few to the exclusion of the many, it might seem superfluous to provide for it in a bill of rights. But our state constitution, copying the ordinance of 1787, declares that, "religion, morality, and knowledge being essentially necessary to good government, and the happiness of mankind, schools and the means of instruction shall for ever be encouraged by legislative provision, not inconsistent with the rights of conscience." This declaration makes it not only the policy, but the duty of government to promote education, and consequently the right of the people to have it. We have already seen that Congress, with a most liberal and enlightened spirit, devotes one thirty sixth part of the public domain for ever, to the diffusion of knowledge. Ohio has thus acquired for the support of schools, more than seven hundred thousand acres. But until 1825, no efficient steps were taken to establish a regular school system. That year was signalized by the adoption of a free school system, of which the following are the leading features. Every township is divided by the trustees thereof into districts, which are organized by the election of a clerk, treasurer, and three directors. The cost of erecting a school house is defrayed by a special tax upon the property in the district, levied by vote of the tax payers. The fund for compensating teachers is made up in three ways. *First*, by the income of the school lands before mentioned. Provision is now made for selling these lands, when those interested will consent, and in vesting the proceeds in a *common school fund*, the interest of which is annually paid by the state to the respective townships. When this is not done, these lands are leased, and the rents appropriated in the same way. *Secondly*, by a tax assessed upon the general tax list; to which the county commissioners may make additions, if they think proper. *Thirdly*, by a variety of fines specially devoted to this purpose. No person can be employed as a teacher without a certificate from at least two of the *examiners* appointed in each county by the court of common pleas. While the fund lasts, the schools are open and free to all the white children residing in the district. The system is yet in its infancy, but much may be expected from it hereafter. It has this transcendent merit, that so far as it extends, it opens the inestimable treasures of knowledge equally to the rich and the poor. Indeed, with respect to the donations made by Congress, there is a provision in our bill of rights, expressly declaring that the poor shall have an equal participation therein with the rich. So far then as the diffusion of knowledge, far and wide among the people, can give value and permanency to our free institutions, the free school system, which is the true democracy of education, is calculated to produce that glorious result.

§ 86. *Rights of the poor.* We have seen that practically no

property is necessary here as a qualification for office, or for the right of suffrage. We have seen that poll taxes are prohibited, for the benefit of the poor; and that they have the same access to our free schools as the rich. We have seen that in criminal cases, those who cannot employ counsel, have counsel assigned them by the court; and although in civil cases we have no provision for suing *in forma pauperis*, yet the practice of not demanding costs until the end of the suit, amounts to the same thing. And if to these provisions we add those abolishing imprisonment for debt, and relieving against the consequences of bankruptcy and insolvency, we shall probably conclude that the poor have no reason to complain of the law. There is no constitutional provision which directly asserts, that those who cannot support themselves, shall be maintained at the public expense. Yet their right of maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization. In a state of nature, the poor might appropriate to themselves the first property within their reach. By entering into the social compact, they have been obliged to renounce this right; and among the chances of life, it has fallen to their lot to be destitute. May they not then claim a bare support as a right? Life is the first and highest of all rights; but what is life, without the means of living? I need not, however, pursue this reasoning; for provision is made for the support of the poor, in all well governed states. I shall briefly indicate the outlines of our system. In every county, the commissioners are authorized to lay a special tax for the erection of a poor house, and to appoint three directors for its management. A tax may also be levied by them, for the support of the poor. No pauper can be admitted into the poor house without a warrant from the trustees of some township, setting forth the facts of his case. This warrant is submitted to the directors, and if they think such pauper is "legally a county charge," he is admitted. But in order to be a county charge, such pauper must have gained a *legal settlement* within the county, without the default of the township. The only persons who cannot gain a legal settlement, are negroes and mulattoes. Indented apprentices legally brought into the state, gain a legal settlement in the township where they first served three years. Married women have the settlement which was last their husband's, if he had one; if not, that which was last theirs before marriage. All other person gain a settlement by residing one year in any township, without being warned to leave it; or three years after being once warned, without being warned again. This warning is given by a warrant from the overseers of the poor. If neglected without good reason, the township, and not the county, is chargeable. If there be no county poor houses, the overseers of the poor provide for the support of those entitled to it, at the expense of the township.

And if persons not so entitled are in a suffering condition, temporary provision is made for them, until they can be removed to the place of their legal settlement, at the expense of the latter.

§ 87. *Right of self-defence.* (a) There are some injuries, which, once committed, cannot be adequately redressed. The taking of life is an extreme case of this kind. Against the commission of such injuries, therefore, every person should not only have the protection of government, when practicable, but should also have a right to defend himself. The right of self-defence would of course exist in a state of nature, and the social compact does not take it away; but the right of avenging an injury already committed is taken away. This is a fundamental distinction. You may prevent an injury from being done, by all proper means; but when done you may not take redress into your own hands. The social compact provides a tribunal to which you are bound to resort; and abundant provision is made for securing the redress to which you may be entitled. Thus the right of self-defence and the right of redress are two distinct things; but both are equally guarantied by the constitution. We have already seen that "the enjoying and *defending* life and liberty," is declared to be an inalienable right. Also, "that the people have a right to *bear arms* for the defence of *themselves* and the state." In England, this right is qualified by the condition, that the arms must be suitable to the condition and degree of the bearer; but here there is no qualification.

§ 88. *Right of redress.* The words of the constitution are, "that all courts shall be open; and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or delay." This declaration asserts the broad doctrine, that for every injury to the *person* or *property*, there shall be an appropriate legal remedy; and pledges the public faith, to make the necessary provision. Thus in return for surrendering the natural right of redressing ourselves, we have acquired the right to call the whole strength of government to our aid in procuring redress. But we must not be misled by the universality of the above language. The redress is to be administered by the "courts," and in "due course of law;" and we shall hereafter see, that there are many injuries which may occasion the keenest pangs to a sensitive mind; but which, from motives of policy, the law does not undertake to redress; and this declaration cannot of course avail the sufferer, when the law does not provide for his case. But in order to furnish the best security, that when the law does provide redress, it shall be faithfully administered, the right of *trial by jury* is explicitly declared. The clause relating to criminal cases has been already quoted.

(a) See 3 Story Const. 746; 1 Black. 143.

Our state constitution contains another declaration, "that the right of trial by jury shall be inviolate." This of course includes civil, as well as criminal cases. And we have already adverted to that amendment of the federal constitution, which extends the right to "all suits at common law, where the value in controversy shall exceed twenty dollars." (a) But here, again, we must not be misled by the universality of the language. These provisions cannot be intended to prohibit a court of chancery from deciding cases without the intervention of a jury; because both constitutions, as we have seen, provide for the exercise of chancery powers. Nor can they be intended to require that justices of the peace should, in all cases, be assisted by a jury; for as their jurisdiction is never final, the parties may, by appeal, obtain the verdict of a jury, if they desire it. And lastly, it has been decided (b) that a jury need not necessarily consist of twelve men, though this is the usual number. The spirit of the declaration is, that the power to decide upon law and fact shall not be committed to the same individuals; but it is left to the legislature to determine how many persons shall be judges, and how many jurors. To guard against the abuse of this right of redress, it is made penal for any judicial or ministerial officer connected with the courts, or any attorney or counsellor at law, to encourage, excite, or stir up any suit, quarrel, or controversy, with intent to injure the persons concerned. But we have no provisions against *maintenance* and *champerty*, as understood at common law. (c) Maintenance was "an officious intermeddling, in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it." Champerty was "a bargain with a plaintiff or defendant, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champerter was to carry on the party's suit at his own expense." Blackstone adds, "in our sense of the word it signifies the purchasing of a suit, or right of suing; a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right." But although we do not punish maintenance and champerty as offences, it has been held that a contract, the making of which would constitute either of these offences at common law, is void as against public policy. This does not prevent a lawyer from making a valid bargain for a fee, and even a contingent fee; but if he should add other stipulations, such as paying all costs himself, and prohibiting a compromise without his consent,

(a) See 3 Story Const. 628.

(b) Hunt v. M'Mahan, 5 Ohio, 133; Beekman v. Saratoga Rail Road Company, 3 Paige, 45.

(c) 4 Black. 134-5; Key v. Vattier, 1 Ohio Rep. 132.

the contract would then be void. And we shall hereafter see that the doctrine of choses in action not being assignable, because it would encourage litigation, exists now merely in name.

§ 89. *Right of changing government.* If all the means before enumerated should fail to secure the happiness of the people, there remains finally, as a last resort, the right of changing their form of government. The declaration of independence, after enumerating the ends of government, asserts, "that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it." This indeed is self-evident, since all power comes from the people. They have created the government, and may destroy it, when it ceases to satisfy them. Delegated power, as above stated, is not irrevocable. The language of our state constitution does not even make the right of changing government depend upon the fact of its having failed to answer its ends; but asserts it without qualification or condition. "Every free republican government being founded on the sole authority of the people, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they deem it necessary." But it is needless to enlarge upon the general right of revolution. It must of necessity exist, whenever a majority desire it, even though the existing government should be in terms made perpetual, as some of the provisions in our constitutions are declared to be. To guard, however, against the evils of a revolution, every constitution provides for its *amendment*, (a) though generally by something more than a bare majority. The federal constitution may be amended as follows:—Amendments may be *proposed*, either by two thirds of both houses of Congress, or by a convention called by Congress, on the application of the legislatures of two thirds of the states. But in either case, such amendments must be *ratified* by the legislatures or by conventions of *three fourths* of the states, according as one or the other mode may be proposed by Congress. But no amendment can be made to deprive any state of its equal suffrage in the senate. Thus far twelve amendments only have been made; the first ten, in 1789; the eleventh in 1798, and the twelfth in 1803. A thirteenth was proposed in 1811, and is sometimes published as an amendment, but it never

(a) The first proposition in the convention was, that Congress should have no voice in amendments. Mad. Pap. 734, 844. This was afterwards stricken out, and it was simply resolved that amendments should be provided for—ib. 1175. It was then proposed that Congress should call a convention, on the application of two thirds of the state legislatures—ib. 1241, 1533-41. Finally, after considerable difference of opinion, the clause was placed in its present shape—ib. 1590-3. A proposition that amendments proposed by the state conventions should be referred to another general convention, was unanimously negatived—ib. 1593-5.

was ratified by the requisite number of states. Our state constitution may be amended as follows:—Two thirds of the assembly must first recommend a convention. The electors must then vote upon the question, at the next general election. And if a majority be in favor of a convention, the assembly must, at their next session, provide for calling a convention, to consist of the same number as make up both branches of the assembly; which convention must meet within three months. No provision is made for a subsequent ratification by the people. In fact the original constitution was never ratified by the people, otherwise than by tacit acquiescence. It is declared that no amendment can be made to sanction slavery. It follows, also, from what has before been said, that no amendment can be made contrary to the ordinance of 1787, or to the federal constitution. As yet no amendment has been proposed.

Here then terminates our view of constitutional law. I have commented, in the brief and general manner required by my plan, upon all the provisions of the federal and state constitutions. I have endeavored so to arrange the subjects, as not to burthen your memory, and at the same time, to exhibit, in juxtaposition, the corresponding provisions of both constitutions, as well as the points of difference. If I have done any thing like justice to this great branch of law, I have exhibited the full reality of that theoretical organization described in the second lecture. In a word, I have sketched the most perfect system of civil polity the world has ever yet seen. One matter of regret, however, deserves to be mentioned. The maxim, *stare decisis*, so essential to stability in the administration of public affairs, has not been sufficiently regarded. It does not seem to be the American disposition *to adhere to established decisions*. I have remarked upon the frequency with which judicial precedents are overruled, when speaking of the common law; but I now refer more particularly to the decisions upon constitutional law. We have seen that half a century of trial has discovered many weighty questions not directly settled by the constitution itself. These have been discussed before the proper tribunals, as long as new light could be thrown upon them, and then finally decided. In most instances, all the departments of government have concurred in the determinations; and a general acquiescence in them, for a series of years, has given them, over well constituted minds, all the authority of express constitutional declarations. And yet how few of these solemn decisions have been suffered by politicians to stand as settled principles! All have been repeatedly assailed, and many completely subverted. At this moment hardly a single construction, once doubtful, can now be considered as established in the minds of the people. And if fifty years will not compose doubts of this kind, will as many centuries do it? The advocates of arbitrary power are doubtless right in pointing to this instability, this incen-

sant fluctuation of opinion, as the most vulnerable part of our system; but I trust that this is only an accidental, and not an inevitable result of the freedom of opinion. Surely submission to the decisions of the constituted authorities, is not incompatible with freedom of opinion. And it seems to me that one of the first lessons to be inculcated upon every American mind is, to acquiesce in established constructions until they shall either be ratified or reversed by constitutional amendments. What if they do not fully meet our individual approbation? Patriotism and magnanimity require us to sacrifice our predilections for the public good. The same conciliatory and compromising spirit which produced our government, can alone perpetuate it. We have an illustrious instance of this spirit in Franklin. As a member of the convention which framed the federal constitution, he had sincerely opposed many of the propositions, which finally prevailed; but when the great work was finished, he addressed the convention in favor of unanimously signing the constitution; and these were a part of his words:—"I consent to this constitution, because I expect no better; and because I am not sure that it is not the best. The opinions I have had of its errors, I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born, and here they shall die." Could we but adopt and practice these sentiments, with regard to the questions which have since arisen, and been constitutionally decided, there would be no shadow upon the prospect of our permanency.

PART III.

THE LAW OF PERSONS. (a)

LECTURE XII.

CORPORATIONS. (b)

§ 90. *The nature of corporations.* I have already observed that the chief objects of law are persons and property. I have also noticed Blackstone's division of rights, into rights of persons and rights of things, as well founded in reason, though not very accurate in point of expression. The rights of persons grow out of their relations to government or to one another; and I have mentioned the classes into which persons are divided, with respect to these relations. Before recapitulating these divisions, however, I cannot forbear to call your attention to the fundamental difference there is between personal relations in this country and in England, in consequence of our entire abolition of privileged orders. Our doctrine of equality has in this, as in every thing else, been productive of simplicity. With us, in theory at least, all men start equally; they are born with equal rights; and their distinctions in after life, are mainly made by themselves. This is the general rule, though, as we shall see, there are some slight exceptions founded on expediency. Whereas, in England, men set out unequally. Some are born to privileges, which others never can attain. Hence, a fundamental division of persons there, is into the *nobility* and *commonalty*. And this gives rise to a variety of subdivisions, rendering the classification of persons exceedingly complicated. The first book of Blackstone is almost wholly occupied with an enumeration of these distinctions; and we have only to glance at the contents of that book, to see how large a portion of it is totally inapplicable to American society. Here, personal relations can be described in half the space required there. The leading divisions contemplated by law, as we have already seen, are as follows. 1. Persons are either natural

(a) On the Law of Persons, in general, see the first book of Blackstone and of Swift; the Lectures of Kent, from the 24th to the 33d inclusive; and Reeves' Domestic Relations.

(b) On the Law of Corporations, see 1 Blackstone, ch. 18; 1 Swift, ch. 9; 2 Kent, lec. 33; Angell and Ames on Corporations; Kyd on Corporations; Wilcock on Municipal Corporations.

or artificial. 2. They are either public or private. 3. They are either citizens or aliens. 4. They are either males or females. 5. They are either infants or adults. 6. They are either sane or insane. 7. They are either freemen or slaves, masters or servants, principals or agents. 8. Indians sustain relations different from any other persons. 9. The death of persons creates the relations of ancestors and heirs, devisors and devisees, and executors or administrators. Some of these relations have already been described in connexion with the constitutional provisions relating to them. Thus we have said all our limits will permit respecting *public functionaries, aliens, slaves, and Indians*. On these classes of persons therefore nothing further will be offered. The rest remain to be described; and will form the subject of this third part of our lectures.

I shall begin with *corporations*, to which this lecture will be devoted. The view I shall present must necessarily be brief; and for those details which do not fall within my limits, I refer to the authors above mentioned. The subject is one of growing importance; for corporations are annually multiplying to such a degree as even to excite alarm in some minds, lest individual freedom of action shall be swallowed up in the prevailing spirit of association. We have seen that corporations are called *artificial persons*, to distinguish them from persons in their natural capacity, or simply human beings. In other words, they consist of natural persons, clothed by law with an artificial character and capacity. When two or more persons desire to unite their means, for the purpose of carrying on some enterprise or business which neither might be able to accomplish by himself alone, there are but two legal ways of doing it conveniently. The persons in question must either be constituted a *corporation*, by means of a legislative act or charter; or they must enter into a *partnership*, by virtue of a contract. In either case, their relations will be determined, partly by the express provisions of the charter or contract; and partly by the implied conditions tacitly annexed by law to each of these relations. Thus while corporations and partnerships both agree in being relations voluntarily assumed by the members; and also in having for their object the association of several individuals for the purpose of co-operation in business; yet they differ so materially in their mode of creation, and in many other respects, that they require a separate consideration. Accordingly partnerships will be reserved for the next lecture.

A corporation may be defined to be a body of persons connected together by law, either contemporaneously or in succession, and endowed with the capacity of acting for various purposes, as a single person. The law knows a corporation only by its *corporate name*. In this name all its acts are done, without a specification of its members; and this determines its continued identity, though all its members should be changed. We often hear a

corporation spoken of as a body without a soul; as an invisible, intangible, and immortal being; as existing only in the contemplation of law; and the like. But such expressions are calculated to throw darkness rather than light, over the actual nature of corporations. It is sufficient to conceive of them as consisting of natural persons, united together in an artificial character, by the force of law, for the purpose of concentrating or perpetuating individual ability. They are purely creatures of the law; because, though the members may voluntarily form themselves into a society or association, the law only can erect them into a corporation. We are told, indeed, that corporations may exist by *prescription*. But the theory of prescription is simply this. From considerations of general expediency, the law *presumes* that what has long been suffered to exist, must have had a rightful origin. If, therefore, persons have long used the name, and exercised the franchises of a corporation, the law presumes, without seeking other evidence, that they had original authority for so doing; or, in other words, that they were once duly constituted a corporation. In older countries, this theory of prescription may be very important; but in this young country, it can be of little consequence. All our corporations, at least since the revolution, have actually derived their existence from a legislative act, which we call a *charter*, and which is to a corporation, what a constitution is to a state—its organic or fundamental law. And we may reasonably presume, that no future corporation will exist but in this way.

§ 91. *Constitutional power to create them.* We have seen that the federal constitution confers no express power on Congress to create corporations. If this power exists therefore in the federal government, it is an *incidental power*; and as such it has been twice exercised by the incorporation of a *national bank*. (a) But with the states it is different. The creation of corporations by them, is regarded as so essential an attribute of municipal sovereignty, that it requires no express constitutional provision. The power not being prohibited, is therefore taken to be conferred. There is, however, in the Ohio bill of rights, the following singular declaration. "Every association of persons, when regularly formed, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates real and personal, for the support of their schools, academies, colleges, universities, and *for other purposes*." The generality of this language would countenance the idea, that in Ohio all applicants have a peremptory and absolute right of incorporation, without any discretion in the legislature. If this be not the meaning, the declaration is without meaning.

(a) It was proposed in the federal convention to confer on Congress the express power to create corporations. *Mad. Pap.* 1354, 1576. That the power exists as an incidental power, see *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank U. S.* 9 Wheat. 738; *Angell and Ames on Corporations*, 42.

But such a construction would be so manifestly impolitic, that it has never been adopted; and the declaration is treated as a dead letter. Our legislature is in the habit of granting or refusing charters, from considerations of expediency, in the same manner, and with the same freedom, as if the constitution had been silent. And why not? If a legislature cannot be trusted with discretion on this subject, it ought not to be on any. The only regret is, that such a provision should be in the constitution, to be actually or apparently violated. In this enterprising and rapidly growing country, corporations are multiplying so rapidly, that a large portion of our legislative business consists in granting and renewing charters. Many of the most important branches of trade and manufacture; all banking and insurance operations; and many of our internal improvements, are undertaken and carried on by incorporated companies. Yet, although so much of good is thus effected, and without any very palpable evil, it is not uncommon to hear corporations denounced as *monopolies*, created for the benefit of the few to the prejudice of the many, and hostile to the great republican principle of equality. But corporations are not necessarily monopolies, in the odious sense of that term. A monopoly, as the name imports, is a special privilege conferred on one or more persons, to the absolute exclusion of all others. In this sense it is deservedly odious, because it is essentially anti-republican. But our corporations are not, in this sense, monopolies. Although charters frequently and confessedly enable the members of corporations to enjoy capacities and realize advantages, which they would not enjoy and realize, as private individuals, and thus have something of the appearance of creating monopolies; yet so long as no *exclusive privileges* are in fact conferred upon any particular corporation; and no class of persons are prohibited from membership; they can with no propriety be said to create monopolies. Our *banks* are the nearest approach to monopolies, because individuals are expressly prohibited from banking privileges. Yet even our banks are not in fact monopolies, because no individuals are excluded from becoming stockholders, if they have the will and the means. And this objection to corporations being without foundation, there is this strong argument in their favor. Under a republican government like ours, where property is so beneficently distributed, that very large fortunes are seldom accumulated, it is manifest that great enterprises, requiring large means, would seldom be undertaken by single individuals. It is only by the creation of corporations, enabling many to unite their means and act as one, that such enterprises are now achieved. It may be safely affirmed, that comparatively few of the wonderful improvements and developments in our country would have been made, if our legislatures had been divested of the power to create corporations, which they have so freely exercised. In this view, therefore, corporations should be the favorites of repub-

licanism; since they enable its friends to meet the only plausible argument that can be urged to sustain that unequal distribution of property which prevails in aristocratic governments. No doubt the power to create corporations may be abused. But when exercised judiciously, it certainly produces most salutary effects.

§ 92. *Their various kinds.* (a) Corporations are divided and subdivided as follows. *First*, into *sole* and *aggregate*. A *sole corporation* consists of a single person and his successors, one after another, no two members existing contemporaneously. The member, for the time being, is thus endowed with a corporate capacity, for the mere sake of uninterrupted succession. But such corporations being confined to the English church, require no comment here. *Aggregate corporations* are those which consist of more persons than one at the same time; and there is no necessary limit to the number who may be thus united. These are first subdivided into *ecclesiastical* and *lay*. *Ecclesiastical corporations* are likewise peculiar to the English and Romish churches. Our *religious societies*, even when incorporated by special charters, have no resemblance to them. But we have a general statute under which most of these societies are incorporated, so far as to hold their church property, without any special charter. *Lay corporations* are again subdivided into *eleemosynary* and *civil*. *Eleemosynary* or *charitable corporations* include only schools, colleges, hospitals, and the like; and have no peculiar attributes requiring comment here. *Civil corporations* of course include all other lay corporations. Lastly, corporations are divided into *public* and *private*. *Public corporations* are those which are founded with public means, and for public purposes. Their criterion is, that no individual has any interest in their foundation, except as a member of the general body politic. To this class belong all municipal corporations, beginning with the United States, and descending down through states, counties, townships, school districts, and the like. These are for the most part denominated *quasi corporations*; since, with the exception of cities and boroughs, they require no special act of incorporation. They possess scarcely any other corporate properties, than those of holding property, and being parties to suits. But the distinguishing quality of public corporations, is, that they are *alterable* at the pleasure of the public, because they involve no private interests distinct from those of the public. *Private corporations* are those which are founded on private means. Their object may be either private or public. But their criterion is a private foundation, whereby individuals have an interest distinct from that of the community. For this reason, private corporations are not alterable at the pleasure of the public. Their charters, as we have seen, are held to be *con-*

(a) 2 Kent, 273; Angell and Ames, 24.

tracts, to which the government is one party and the corporators the other; and they are within the protection of that great constitutional guaranty, which secures contracts from being impaired by subsequent legislation. (a) Unless, therefore, the charter of a private corporation contains an express reservation of the power to alter it, thus making the power of alteration one of the terms of the contract, the legislature can make no alteration in it, without the consent of the corporators. This doctrine, though much inveighed against by demagogues, is abundantly established by judicial decisions; and it is the foundation of that general confidence, with which individuals embark their funds in corporate enterprises. Of late, however, attempts have been made to depreciate the value of this security, by broaching the doctrine, that although a state legislature cannot repeal or alter a private charter; yet the people of a state may do it, by amending the constitution for this purpose. But to this pretension, the language of the federal constitution affords a complete answer. "No state shall pass *any law* impairing the obligation of contracts." Unless, therefore, it can be shown that a state constitution is not a *law*, the charter of a private corporation can no more be impaired by a state constitution, than by a statute. Seldom or never has so bold and disorganizing a doctrine, been reared upon so feeble a foundation. And we may congratulate ourselves that the federal constitution, which thus protects chartered rights, is "the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding." In this state, however, this principle will be of no value to future corporations, because by an act of 1842 it is declared that the charter of every corporation of every description, which shall thereafter be granted, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature.

§ 93. *Their general powers and properties.* (b) As a general principle, the powers, and consequently the disabilities of corporations, are to be sought, for each corporation, in its particular charter. We have no disabling statutes, like the *statutes of mortmain* in England, prohibiting corporations from receiving or holding property; nor are corporations prohibited, as in England, from being devisees, under our *statute of wills*. The charter, then, of each particular corporation is the expositor, as well as source, of its powers. And the prevailing doctrine is, that charters are to be construed strictly; and that corporations can exercise no powers which are not expressly specified, or necessarily implied, in their charter. (c) In this respect, a charter is

(a) *Dartmouth College v. Woodward*, 4 Wheat. 518; *Charles River Bridge v. Warren Bridge*, 11 Peters, 421; *Providence Bank v. Billings*, 4 Peters, 514.

(b) 2 Kent, 277.

(c) 2 Kent, 298; *U. S. v. Arredondo*, 6 Peters, 736; *Beatty v. Knowler*, 4 Peters, 162.

more analogous to the federal than to a state constitution. This doctrine measures at once the powers and disabilities of corporations; for there is an implied prohibition of every power not thus conferred. Of course, the powers of different corporations must vary according to their object. Those of a college or hospital, for example, must be very different from those of a banking, insurance, manufacturing, or bridge company. So that an enumeration of the particular functions of the various existing corporations, would require volumes. I can only refer to some general principles which are applicable to all.

1. The management of the affairs of a corporation, pursuant to the provisions of the charter, must depend upon the votes of the members. What shall constitute *membership* must depend upon the nature of the corporation. Generally it is the ownership of *stock*. The charter limits the amount of *capital*, which is divided into equal *shares*, and every shareholder is a member. But in many of the charitable corporations there is no distribution of stock; and in these, the members consist of those only who are required for managers, having no pecuniary interest. In such cases, if the endowment be private, the founder or donor may stipulate for the management or *visitation*, as it is technically called, of his charity; and the charter will constitute the persons thus indicated members of the corporation. But in whatever way the members be made such, the general rule is that the majority shall govern, where the contrary is not provided. The will of the majority is expressed by votes, and evidenced by the records. But in business corporations the representative principle is usually adopted; and the immediate supervision is committed to a *board of directors* elected by the stockholders, together with other appropriate officers. And in elections by the members, the general principle of voting, which requires personal attendance, is departed from, and votes are given by *proxy* or power of attorney. For this, however, it is presumed there must be special provision in the charter or by-laws. Where the charter does not specify the number of members or directors who shall constitute a *quorum* for business, the rule is, that a quorum of directors shall be a majority of the whole number; but a quorum of members shall be a majority of those present, the whole having been duly notified. The power of *amotion*, by which is meant the removal of officers, is incidental to every corporation, without express provision, provided there be good cause; this being necessary to self-protection; but the power of *disfranchisement*, by which is meant the expulsion of members, requires an express provision. This is true, at least, of all joint stock corporations. To prevent abuse, however, in the management of corporations, they are made ultimately amenable to the courts of justice. If they neglect or refuse to perform a positive duty devolved upon them by the charter, a writ of *mandamus* may be issued, to com-

pel such performance; and if they attempt to exercise any power not conferred by the charter, a writ of *quo warranto* may be issued, to compel them to desist from such usurpation. Charitable corporations, even when their visitation or supervision is provided for by the founder, as the condition of his donation, have always been held amenable to the courts of chancery for the proper discharge of their duties. And in this state, by the act of 1842, the several courts sitting in chancery have a visitorial jurisdiction over all corporations in the following cases. 1. To compel the directors or officers to account for their management of the funds of the corporation. 2. To compel them to pay the value of all property acquired to themselves, or transferred, or lost, by any violation of their duty. 3. To suspend or remove them for gross misconduct. 4. To prevent or set aside any alienation of the property of a corporation made contrary to law, or for purposes foreign to its business. Moreover, the directors or officers are made personally liable for any loss accruing to the corporation through their mismanagement.

2. The most important property of a corporation is that of *uninterrupted succession*, so long as the charter endures, independently of the death or change of members. The common expression is, that a corporation never dies; but this is not strictly true; because it must expire with the expiration of the charter, if not before. The meaning is, that the existence and identity of a corporation are not affected by mutations of membership. One goes out, and another comes in, under the provisions of the charter, and the corporation is still the same legal entity, and experiences no interruption in its operations.

3. All the acts which a corporation can do, are done in its *corporate name*, without any specification of the members. This name is always fixed by the charter, and the shorter it is, the better. The advantage of this union of many interests under a single name is at once perceived. How great would be the inconvenience, if, in suing and being sued, receiving and transferring property, making contracts, or doing any other acts to which corporations are competent, the names of all the members must be repeated.

4. Corporations are authorized to have and use a *corporate seal*. The nature and properties of a seal will be described hereafter. The ancient doctrine was, that a corporation could only speak and act under the manifestation of its seal. But this is now changed; (a) and corporations are not required to use a seal, except in those cases where it would be necessary for individuals. They may not only contract in writing without a seal; but may even be bound by implied contracts, in the same manner as individuals.

(a) 2 Kent, 289; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Fleckner v. U. S. Bank*, 8 Wheat. 338.

5. Corporations are authorized to make *by-laws*, for the regulation of their business in detail. These by-laws sustain the same relation to the charter, that statutes do to the constitution; at least the analogy sufficiently explains their nature. They must not be repugnant to the charter or other laws of the land; and they must flow expressly or impliedly from the powers conferred in the charter, as the appropriate means of executing those powers.

6. Corporations cannot commit *crimes* or *forcible injuries*, though their members may. They cannot do any strictly personal act, as giving testimony, and the like; and therefore, in chancery, a corporation answers under seal; or if an oath be required, one of the officers is personally made a defendant. But corporations may be liable for the acts or omissions of their officers or agents, as much as for their own contracts and undertakings; even though such acts should in themselves be trespasses.

7. The individual members of a corporation are not personally liable for its *debts*, beyond the amount of their shares in the capital stock, unless expressly made so by statute, which is not usual. The capital stock may consist of personality, or realty, or both; but the shares are treated as personality. They are usually evidenced by *certificates*, specifying the amount paid in, which is called their par value. Sometimes these certificates are made transferable by indorsement; but generally the transfer is made on the books of the company. Corporate property cannot be made liable for the individual debts of the stockholders; but their shares may be so subjected, by taking the proper steps. Frequently provision is made that in case of mismanagement, to the injury of third persons, the directors shall be personally liable for the consequences; and sometimes all the stockholders are made thus liable. The latter, however, is not accounted good policy, because few persons would become stockholders upon such a condition; though the personal liability of the directors for mismanagement, furnishes an important security against corruption or abuse. But in this state, by the act of 1842, not only the directors of all corporations, but also the stockholders of all corporations not charitable, if they be of age, are made jointly and severally liable, in their individual capacity, for all the debts of the corporation; and any transfer of stock made by them, with intent to avoid such liability, is declared to be void. Judgment and execution are first to be had against the corporation; and if not satisfied, they may be made parties by *scire facias*; and if one of them pays the debt, he may enforce contribution from the rest.

§ 94. *Their termination.* A corporation may be terminated in the five following ways:—

1. *By statute.* This applies only to future private corporations, as before explained; for we have seen that the charters of pre-existing private corporations are contracts, which the legisla-

ture cannot alter or impair, without an express reservation of the right so to do. But public corporations, being under the exclusive direction of the legislature, are alterable or dissoluble at pleasure. Yet even here, if private rights have been legally acquired under these corporations, the legislature cannot impair them.

2. *By efflux of time.* Almost all charters are granted for a limited period; perpetual charters not being deemed expedient. When this period arrives, the corporation is of course dissolved, unless the legislature see fit to revive it; and no more of its original functions remain, than are requisite for winding up its concerns.

3. *By surrender.* The acceptance of a charter does not involve a positive obligation to continue it until its natural expiration. Whenever, therefore, the members desire it, they may surrender their charter, and thus terminate their corporate existence. It is said, however, that there must be a formal acceptance of the surrender by the legislature; but unless some interests are to be affected, other than those of the corporators, it would seem as if there can be no good reason for requiring such acceptance.

4. *By death.* This does not apply to joint-stock corporations; because, if all the stockholders should die, the shares would pass to their personal representatives, and the corporation still continue; but with respect to charitable corporations the case is otherwise: these may be so constituted, for want of foresight in the charter, that the death of all the members would work a dissolution, for want of the means of keeping up the succession. Such a contingency should therefore be provided for in the charter.

5. *By forfeiture.* A forfeiture of the charter can only be enforced by judicial proceedings. The causes of forfeiture may be included under two heads, *misuser* and *nonuser*; that is, an abuse of corporate powers, or a neglect to use them. Without any express provision in the charter, either of these, when judicially ascertained, will authorize a court to adjudge the charter forfeited. But the prudent course is to specify in the charter what causes shall create a forfeiture, and how their existence shall be ascertained. In this state, however, it is provided by the act of 1842, that any corporation, other than a bank, shall be considered as having forfeited its charter, if it shall become insolvent, or wrongfully refuse to pay its debts, or suspend its ordinary business for one year, or put in circulation any paper calculated to circulate as currency, or wilfully violate any provision of its charter or other law of the state. And in such case, any creditor or stockholder, or the prosecuting attorney of the county may apply to either of the courts sitting in chancery for an injunction to restrain such corporation from further exercising its functions; and receivers will be appointed to wind up its concerns.

When a corporation is dissolved in either of these ways, its debts are to be first paid; and the residue of its property being converted into money, is to be refunded to the stockholders; and

to avoid all difficulty or doubt as to the power of thus winding up affairs, it is prudent to make special provision in the charter for such winding up. But in this state, by the act 1842, there is a general provision, that on the dissolution of any corporation, unless other special provision be made, the directors or managers acting last before the dissolution, shall be trustees with full power to wind up the concerns of such corporation.

The view now presented of corporations, meagre and imperfect as its brevity has compelled it to be, exhibits for your more detailed examination, an admirable invention of the law, for the concentration and perpetuation of human energies and interests. The most successful projects of personal enterprise are daily and hourly liable to interruption by death; and the more persons are concerned together, the greater is this liability; for when one of the association dies, the association itself is dissolved; the agents provided by law come in to settle up the concerns of the deceased, and the survivors wind up the concerns of the association. Thus the grandest projects may be stayed or frustrated in mid career. But to prevent this inconvenience; to take away the power of death and change; to give the association a more close, and stable, and permanent union, than the natural condition of man allows; the law steps in, with its salutary power, and bids the body corporate persevere in its operations, undisturbed by such chances and changes; and the artificial person thus formed out of many, instead of being incumbered by its numbers, conducts its operations with the same energy, simplicity, and unity, as a single individual.

LECTURE XIII.

PARTNERSHIPS. (a)

§ 95. *The nature of partnerships.* It is usual to treat of partnerships under the head of contracts, because a partnership is created by contract. But I have thought the subject properly classed among personal relations. The relation between partners, like that between corporators, is a highly important business relation; and the strong analogy between these two relations, suggests the propriety of discussing them consecutively. On the subject of partnerships we have no local provisions. The common law of the commercial world is our law; and the subject is one of vast compass and great practical importance. I shall present

(a) See the 43d lecture of Kent; the treatises on Partnership by Story, Watson, Gow, Collyer, Cary, and Montagu; and Smith on Joint Interests.

only a very general outline, and refer you for details to the authors mentioned in the note. Upon the general object of partnerships, I need only remark, that it is much the same as that of corporations, that is, the association of several persons for the prosecution of any enterprise or business. The reasons why a partnership is not so efficient for this purpose as a corporation, will appear in the sequel.

A partnership may be said to exist, when two or more persons contribute their property or services, to be employed jointly in some enterprise or business, the profit or loss of which is to be shared among them in some fixed proportion. This definition suggests five points to be noticed. *First*, a partnership is always the result of a contract, but the contract need not necessarily be in writing. The law will always imply a contract, where the persons act as partners. *Secondly*, there may be any number of persons in the partnership; but in proportion as the number is increased, the operations become more unwieldy and inconvenient; which is not the case with corporations, on account of their entire legal unity. On the other hand, we sometimes see a single person doing business under a corporate name, to give greater consequence to his concern; but this is a mere deception. *Thirdly*, each partner must contribute something valuable to the partnership means; but this contribution may consist either of money, other property, credit, labor, or skill. Any thing valuable, so as to found a claim to a share of the profits, will be sufficient to satisfy the legal requisition. *Fourthly*, a partnership may be formed either for a single project or enterprise, or for an entire and continuous branch of business, or for business in general, including all the operations of the parties. And whether a given partnership is general or special, must be ascertained from the contract, or the facts from which the contract is implied. *Fifthly*, each partner must share in the profit or loss, in some stipulated ratio. But if no ratio be agreed upon, the law implies an equal ratio, however unequal the contributions may be; it being against the policy of the law to go into an estimate of the values contributed, in order to make for the parties a bargain, when they have omitted to make one for themselves. But in all cases there must be a sharing of profit or loss. A mere salary, though it should vary according to the profits, would not make the receiver a partner. Such then are the elements of a partnership, with respect to the partners themselves.

But with respect to the rest of the world, a partnership may be held to exist, without uniting all these elements. If, for example, persons having no joint interest, which would constitute them partners with respect to each other, hold themselves out to the world as partners, the law will hold them liable as partners. And on the other hand, if persons not appearing to the world as partners, have nevertheless a secret joint interest in fact, such as

would constitute them partners, the law will hold them liable to the world as partners. Indeed it is a general rule in the law of partnership, that no secret arrangement among partners, varying their general rights and liabilities with respect to each other, can affect their general liability with respect to third persons, unless made known beforehand. Without such a principle, partnerships might be a cloak for fraud and deception. But by holding partners responsible for the general aspect they assume before the world, and for attempting to conceal from the world the actual state of their relations, the ends of justice are effectually promoted. Thus you will perceive, that in studying the law of partnerships, they are to be contemplated in two distinct aspects; the one embracing the mutual relations of the partners to each other; and the other their joint relation to the rest of the world.

It is usual, in forming a partnership, to agree upon some *name* or *style*, under which all the business of the firm is to be transacted, and which each of the partners is authorized to use for that purpose. This name may or may not specify the names of all the partners; or it may not truly specify any of them; but in either case all the partners in fact will be bound by it; and if no name be agreed upon among the partners, a partner may act in the name of himself and company, and bind the firm. But here we see an important difference between a partnership and a corporation. The partnership name, though sufficient for many purposes, is not sufficient for all. In prosecuting and defending suits, conveying real estate, executing instruments under seal, and perhaps in some other transactions, it is necessary to use the names of all the partners; and if they be very numerous, this may be no small inconvenience. However, these are exceptions to the general rule, which is, that the partnership name is sufficient for partnership purposes. Would it not be a salutary change, to provide by statute, that the partnership name should be sufficient for all purposes? And would it not be well, in all cases, to require partners to record the names of the members of the firm, in some public place, to which all persons interested might have access? The general interest of the community may be prejudiced, but cannot be promoted, by permitting concealment in these important matters.

§ 96. *The capital stock.* This may consist of personalty, realty, or both. It includes that which is originally contributed, and the subsequent additions and accumulations. Each partner has a joint interest in the capital stock, whatever be its specific character; the extent of which interest depends upon the agreement among the partners. But what you are to observe is, that the interest is a *joint one in the whole*, and not a separate one in any particular part. It cannot be severed and made exclusive, so that one partner can claim any specific portion as his own, until all the partnership concerns have been settled, and a division

made, either by mutual consent, or the intervention of a court. For technical reasons, the law makes some distinction between realty and personalty, which will be better understood when we come to speak of *tenants in common*, in the lectures on property. But a court of chancery will treat both alike, whenever this is necessary to protect the rights of third persons; as in case of death or insolvency.

§ 97. *Authority of each partner.* The general rule is, that by the mere formation of a partnership, without any special agreement for that purpose, each partner becomes an *agent* for the whole firm, with authority to do in the firm name, whatever the whole firm could do, *within the regular scope of partnership business*. But this authority extends only to what comes fairly within the partnership design; and beyond this, the firm are not bound by the acts of one of the partners, because the world have no right to presume an authority any further. Within this general limit, the firm are bound with respect to the world, even though the act should be contrary to an express stipulation among themselves; because the world are not presumed to know of any secret limitation. If however a third person can be charged with actual knowledge of such limitation, then the rule ceases because the reason ceases. The only difficulty in applying this general rule is, to determine what is within the general scope of partnership business. This is a question of fact, depending chiefly on the nature of the business. But in general terms, the power of a partner to bind the firm, embraces the purchase and sale of property, the collection, payment, and release of debts, and the making of all contracts required in the partnership business. The leading exceptions are these. One partner cannot, without special authority, pledge the property or credit of the firm, for matters unconnected with their business; nor bind the firm by a guaranty of the credit of a third person; nor execute a deed in the name of the firm, for the conveyance of real property. These are only the leading cases and exceptions. To give details, would carry me too far for my limits. What I have said will illustrate the general rule, and that is all I design.

§ 98. *Partnership liabilities.* We have seen that the stockholders of a corporation, unless the contrary be provided in the charter, are not personally liable for the debts or undertakings of the corporation, beyond the amount of their shares in the capital stock; but the reverse prevails with respect to partnerships. By the common law, there is no such limited responsibility; and each partner is personally liable for all the partnership debts and undertakings. To limit this liability, a special statute is necessary. In some of the states such provision has been made, and *limited partnerships* are permitted; whereby a partner may put into the concern a given amount of capital, and by making public record of the fact, may exempt himself from liability beyond that amount.

Such provisions are deemed highly beneficial; because they take away the fear which often withholds capitalists, from employing their means in this way. But as we have no such law, there can be no limited liability here; and if the partnership means are unequal to the liabilities, the deficiency must be made up by the individual partners. The course of proceeding is this. The first claim upon the partnership fund is that of the partnership creditors. When they are satisfied, the next claim is that of the individual partners, to whom the firm may be indebted. If a surplus still remain, the creditors of an individual partner, may reach his share, when ascertained; but if the partnership funds have been exhausted, without paying all the partnership debts, the unsatisfied partnership creditors, have the same right to be paid out of the separate means of one of the partners, as his private creditors have; there being no preference in such cases. (a)

§ 99. *Partnership remedies.* Of remedies in general, I am to speak in the sixth part of these lectures; but the relations of partners, in this respect, are so peculiar, that a few words on the subject will be proper here. One partner cannot sue the firm at law for a debt due by them to him, because, in so doing, he would have to sue himself, as one of the firm. For the same reason, if one person be a member of two distinct firms, neither firm can sue the other. Again, one partner cannot sue the rest of the firm for his share of a debt due by the firm to him; because until the business is closed by dissolution, the joint interest cannot be thus severed. In all such cases, therefore, the only remedy is in *chancery*, which can rise above these technical difficulties. But one partner may sue another for a breach of the partnership agreement, because this supposes the partnership at an end; and for any matter not growing out of the partnership, of course partners have the same remedies as other persons. When the litigation is between a partnership and third persons, all the firm must sue or be sued jointly, and not separately; because the right or liability is always joint and not separate. And when a judgment has been obtained against the firm, a court of chancery will compel the creditor to exhaust the firm property, before proceeding against that of the individual partners. In like manner, when a judgment has been recovered against an individual partner, chancery will compel the creditor to exhaust his private property, before he can proceed against his ultimate share in the property of the firm, which can only be ascertained on a final adjustment of accounts. From these remarks, it will be seen that whenever partners are concerned in litigation, the remedies in chancery are much more efficacious than those at law.

§ 100. *Termination of partnerships.* When a partnership

(a) *Grosvenor v. Austin*, 6 Ohio, 103.

embraces only a single transaction, it is of course at an end when that is completed. When it is created for an indefinite period, either of the parties may dissolve it at pleasure, unless there be an agreement that a certain notice shall be given; in which case the agreement must be complied with. In some cases also, where a sudden dissolution would produce great injury, chancery will interfere by injunction to prevent it, even though there be no agreement as to notice; but when the partnership is for a definite period, it must continue through that period, unless all the partners agree to a dissolution, or some one of the following causes intervenes to effect a dissolution. 1. The *death* of one of the partners always works a dissolution; for his representatives cannot come in as partners, except by special consent. All they succeed to, is the share belonging to the deceased partner, to be ascertained on final settlement of accounts down to the time of his death. And the duty of winding up affairs devolves upon the surviving partners; for the representatives of the deceased have no power to act in the matter, and can neither sue nor be sued on account of partnership concerns. 2. The *insanity* of a partner, though it does not of itself work a dissolution, will authorize a court of chancery to decree a dissolution. 3. If a single woman be a partner, her subsequent *marriage* will work a dissolution, because by marriage she loses the legal capacity of acting. 4. When the object of a partnership becomes utterly *impracticable*, a court of chancery will decree a dissolution. 5. A *war* between the different nations to which partners belong, works a dissolution, on the principle before stated, that a war between two nations disqualifies the citizens of those nations from holding intercourse with each other. 6. It has also been held that the *voluntary transfer* by one partner of all his interest to a third person, amounts to a dissolution; since no partner can introduce a stranger into the concern. But this is an unreasonable rule, because it puts it in the power of a partner to dissolve at any time, against the will of the rest. The just rule would be to hold the transfer void. 7. A very strong case of *imbecility, fraud, or misconduct* in one of the partners will induce a court of chancery to decree a dissolution. 8. Where a bankrupt law exists, the *bankruptcy* either of the whole concern or of one of the partners, will effect a dissolution. And the same would be the result under our insolvent law, where an assignment is made to the commissioner. 9. Where one of the partners is an *infant*, he may dissolve on becoming of age, as he may disaffirm any other contract. The result of a dissolution is, that the authority of each partner to bind the firm ceases, unless it be continued, by special agreement, for winding up the concern; but all the existing liabilities continue; and if those who have before dealt with the firm, are not specially notified of the dissolution, a dishonest partner may still involve the firm in new liabilities to them; for as

to them, a mere advertisement of dissolution is not sufficient, unless it can be shown that they knew it. But as to all others, an advertisement is sufficient. When the dissolution is decreed by a court of chancery, a *receiver* is usually appointed to settle up the business. In all cases of a voluntary dissolution, a partner may insist upon a sale of the joint stock, for the purpose of settlement, unless a division can be agreed upon. The principles of settlement have already been stated.

The view now taken of the law of partnerships, though a mere synopsis, enables us to form an opinion upon the comparative advantages of the two kinds of associations, corporations and partnerships; and we can hardly hesitate in giving the preference to corporations. Their ability to do all acts in the corporate name without specifying the members; their independence of the death, or transfer of interest among the members; and the liability of the members only to the extent of their respective interests, are three points in which corporations have decidedly the advantage of partnerships. Yet in the common transactions of life, and more particularly in the commercial world, partnerships are deemed to answer all the purposes of association; and are much more numerous than corporations. Nor can you have failed to remark, that the law of partnership, as above explained, is pre-eminently liberal and just in its principles. Probably no branch of the law deserves a higher encomium for these qualities.

LECTURE XIV.

HUSBAND AND WIFE. (a)

§ 101. *Condition of females compared with males.* Having treated of the two principal business relations, we come now to what are called the *domestic relations*. These are four, namely, *husband and wife*, *parent and child*, *guardian and ward*, and *master and servant*, each of which will form the subject of one lecture. To say that the law which regulates these relations, is of the highest practical interest, would be to assert a mere truism. Every person, whether lawyer or not, ought to be familiar with this part of the law. We have a few statutory provisions on the subject, but for the most part, the law of husband and wife is

(a) On the subject of Husband and Wife, see 2 Kent, lec. 26, 27, 28; 1 Blackstone, ch. 25; 1 Swift, ch. 5; Roper on Husband and Wife; Clancy on Husband and Wife; Bingham on Coverture; Poynter on Marriage and Divorce; Reeve's Domestic Relations.

common law, and you will find that it savors of its origin in all its leading features. The whole theory is a slavish one, compared even with the civil law. I do not hesitate to say, by way of arousing your attention to the subject, that the law of husband and wife, as you gather it from the books, is a disgrace to any civilized nation. I do not mean to say that females are degraded in point of fact; I only say that the *theory of the law* degrades them almost to the level of slaves. With regard to *political rights*, females form a positive exception to the general doctrine of equality. They have no part or lot in the formation or administration of government. They cannot vote, nor hold office. We require them to contribute their share in the way of taxes, to the support of government, but allow them no voice in its direction. We hold them amenable to the laws when made, but allow them no share in making them. This language, applied to males, would be the exact definition of political slavery; applied to females, custom does not teach us so to regard it. Perhaps it would be difficult to deduce from any abstract reasoning, the justice of making this their political condition. But we know that it always has been what it now is, and there is no prospect of changing it; and probably the most refined and enlightened of that sex, would be the last to desire a change, which would involve them in the turmoil of politics. As to *legal rights* the case is different. So long as a woman remains single in this country, her legal rights and capacities are not inferior to those of a man. I say in this country, for in England the laws of inheritance give males altogether the advantage. With some trifling exceptions, the son or brother takes all, to the entire disinheritance of the daughter or sister. The glaring injustice of this rule of inheritance, which prefers males to females, is so palpable, that we can claim little credit for having totally abolished it. If either sex is to be preferred, it certainly ought to be females, because they are least able to make their way in poverty through the world. But our law stops at the point of perfect equality, and women inherit precisely as men. Also, in general, so far as relates to the acquisition, control, and transfer or transmission of property, single women stand on the same footing as men. They can make the same contracts, and perform the same legal acts. In a word, the general rule is, that the legal competency of a single woman, or *feme sole*, as she is technically called, is the same as that of a man, and in some few particulars, perhaps, she may be considered as having the advantage. She attains her majority here at eighteen; he at twenty-one. She can choose her guardian at twelve; he at fourteen. She can marry at fourteen; he at eighteen. In a word, the law considers her as arriving at maturity, three or four years earlier than he does. Again, in relation to civil arrests, she has a peculiar privilege. In this state no female can be arrested for debt; and in this exemption she is

named in company with the officers and soldiers of the revolution. This exemption does not of course, embrace criminal matters. But when a woman marries, we call her condition *coverture*, and speak of her as a *feme covert*. The old writers call the husband *baron*, and sometimes, in plain English, *lord*. In fact, the scene is now entirely changed. The merging of her name in that of her husband, is emblematic of the fate of all her legal rights. The theory is, that marriage makes the husband and wife one person, and that person is the husband. He is the substantive and she the adjective. In a word, there is scarcely a legal act of any description, which she is competent to perform. The common reason assigned for this legal disfranchisement of the wife, is, that there may be an indissoluble union of interest between the parties. In other words, lest the wife might be sometimes tempted to assert rights in opposition to her husband, the law humanely divests her of rights. For the arguments by which this doctrine is vindicated, I must refer you to the books. It is my province to state what the law is, and not to justify it.

§ 102. *Marriage*. Marriage, whatever may be the popular idea of it, is regarded by the law as merely a civil contract. We have not even ecclesiastical courts to take cognizance of it. I shall treat the subject in the order of events.

1. *Matters preceding marriage*. When parties have agreed to marry, or done any acts from which such agreement can be inferred, and one of them afterwards refuses, a court of chancery cannot, as in ordinary cases, compel a specific performance; but either party may sue the other at law, for a *breach of promise*; and very heavy damages are often recovered in such suits. But, if the parties intend to consummate their agreement, there are some preliminary arrangements frequently made, to obviate the helpless condition in which the law places the wife during marriage. These are chiefly two, *jointures* and *settlements*, (a) both made for the benefit of the wife. A jointure is the separate provision made by the husband for the wife's support. A settlement is the separate provision made by the parents or friends of the wife for her support. These may indeed be made after marriage, but they are usually made before. The method is to place the portion set apart for the wife, under the control of trustees; who manage it, independently of the husband, for the benefit of the wife, and perhaps for the issue of the marriage. And the propriety and importance of making such arrangements will be obvious, when we come to speak of the authority which the husband exercises over the whole property, when not thus placed beyond his reach. If it be called generosity in the husband, in anticipation of some possible reverse of fortune, to provide a sure support for his wife in the day of adversity, by placing some portion of his

(a) See Atherley on Marriage Settlements.

property for her separate use, beyond the control of himself or his creditors; it must be considered a sacred duty in the parent, to take this precaution. And when we daily see the distress, which might thus easily have been prevented, we cannot but wonder that these arrangements are not more frequently made.

2. *Who may marry.* By our law, all male persons of eighteen and upwards, and all females of fourteen and upwards, not being nearer of kin than first cousins, are capable of marrying. But if the male be under twenty-one, or the female under eighteen, the consent of the parent or guardian must be first obtained. Nothing is said with respect to color; and of course blacks and whites may intermarry, if their tastes harmonize. It is required, however, that in this, as in other contracts, each party should be capable of consent, or *compos mentis*; and therefore *idiots* and *lunatics* cannot marry. Again, the parties must be single, in order to marry. If, therefore, either party has a husband or wife living at the time, not only is the second marriage void, but, the crime of *bigamy* is committed, which will be described hereafter.

3. *Preliminary steps.* Before the marriage takes place, by our law, there must either be a *publication of banns*, or a *license*. Publication of banns consists in proclaiming the intention of marriage, in the presence of a religious congregation, in the county where the female resides, on two different days, the first being at least ten days before the marriage. A license is a written permission obtained from the clerk of the court of common pleas, of the county where the female resides, under the seal of the court. If either of the parties be a minor, and never married before, the clerk, before issuing the license, must be assured of the consent of the parent or guardian, either from his personal declaration, or from his written consent attested by two witnesses. And the clerk may put the applicant upon oath, as to the legality of the marriage in other respects. The penalty for issuing a license contrary to these provisions, is one thousand dollars.

4. *Who may solemnize marriage.* The persons who may here solemnize marriage are as follows:—1. Any regularly *ordained minister* of any religious society within the state; he having first obtained from the clerk a license for that purpose; which license is granted of course, in the county where he officiates, upon exhibiting the proper credentials. Should he officiate in another county, after procuring his license, he must apply to the clerk thereof, exhibiting his former license, and have his name entered, as a person licensed. 2. Any *justice of the peace* within his county, who requires no special license. 3. Any *religious society*, agreeably to its forms and regulations. When parties marry, upon publication of banns, and without license, the person who is to solemnize the marriage, must be satisfied that the banns have been duly published; and if either of the parties be a minor, he must have proof of the consent of the parent or guardian, in

the same manner as the clerk when he issues the license. But where the parties marry upon license, a production of the license is sufficient. There is no prescribed form of solemnizing marriage; and it will be sufficient, if the parties declare, before the proper person, that they will live together as man and wife. When the marriage has been solemnized, the person officiating must transmit a certificate thereof to the clerk of the county for record, within three months, under the penalty of fifty dollars; and this must be recorded under a similar penalty. The penalty for solemnizing a marriage contrary to these provisions is one thousand dollars; and the penalty for attempting to solemnize a marriage without authority, is five hundred dollars. But non-compliance with these requisitions does not make a marriage void. (a) With respect to foreign marriages, the rule is, that a marriage valid in the place where it was solemnized, is valid every where.

§ 103. *Rights and liabilities of the husband.* The rule formerly was that the husband had the same power over the *person* of the wife, as over a child, servant, or apprentice; and upon the same principle, the right of a master. Accordingly, if necessary in his opinion, he might administer reasonable personal chastisement. But in this country, we recognize no such doctrine. A husband has no right to strike his wife, whatever may be the provocation. Against such indignity, she has a twofold security. She may either have him put under bonds to keep the peace, or she may apply for a divorce. The limit of his power over her person is this. If she manifest a disposition to squander or destroy property, he may use the means necessary to prevent her; and if she leave him without cause, he may bring her back; for he has a right to her society, which he may enforce either against herself, or any other person who detains her. He may also have his action for damages against any person who abducts or seduces her. And it is said that if he should take the life of a person found in the very act of criminal connexion with her, it would be excusable homicide. But his power over her *property* is much more extensive than over her person. I have already said that property may be so secured to the wife in the form of a jointure or settlement, by means of trustees, that neither the husband nor his creditors can control it; but I shall here suppose that no such precaution has been taken. Then, by marriage, all her *personality*, except choses in action, becomes at once absolutely his. And as to choses in action, they become his by reducing them to possession, which he may do, by suit or otherwise, independently

(a) See Reeve's Dom. Rel. 196, 290; 2 Kent, 89, 90; Milford v. Worcester, 7 Mass. 48; Ligon v. Buxton, 2 Greenl. 102; Wycoff v. Boggs, 2 Halst. 138; 2 New Hamp. 268. Some of these authorities go so far as to say, that a marriage according to the common law, which only requires the consent of the parties, would be valid, though none of the requisitions of the statute be complied with.

of her control. He may, if he choose, join her name in the suit, but he is not obliged so to do; and the only effect of so joining her would be, that if she survive him, and the judgment or decree be not collected, it will become hers by survivorship. If he was himself the debtor, the marriage cancels the debt. If she has earned money by her own labor, during the marriage, he may collect it. Thus her personalty is entirely at his control. But with respect to her *realty*, the case is somewhat more favorable. He only has control of the *income*. Without her consent, he cannot incumber or dispose of the property itself, beyond his own life. (a) In this one instance, the law gives her a veto upon his power; for he cannot compel her to give consent. And, on the other hand, by marriage the husband becomes liable for the *support* of the wife; but this liability extends only to *necessaries* suited to her condition, and not to elegancies or luxuries. Nor does it depend at all upon the amount of property he obtains by her. To the extent of necessaries which he does not supply, she may contract debts; and he will be bound for them, even though he should give notice to the contrary, unless she had eloped: and this is the only instance where she can bind him by her contracts, except where she acts as his agent. If she had contracted debts before marriage, he becomes liable for them, whether he obtained property by her or not; but this liability can only be enforced during the coverture; for the death of the wife discharges the husband; and the death of the husband discharges his property. Finally, the husband is liable for any civil injuries, technically called *torts*, committed by the wife during coverture; but not for her crimes.

§ 104. *Rights and liabilities of the wife.* The condition of the wife may be inferred from what has already been said. She is almost entirely at the mercy of her husband; she can exercise no control over his property or her own. As a general rule she can make no contracts binding herself or him. With the exception just stated, her contracts are not merely voidable, but absolutely void. Nor can she make herself liable for his contracts, torts, or crimes. Her only separate liability is for her own crimes: her only joint liability is for her own *torts*, committed without his participation; and for contracts, in which the law authorizes her to unite with him. She has no power over his person, and her only claim upon his property is for a bare support. In no instance can she sue or be sued alone in a civil action; and there are but few cases in which she can be joined in a suit with him. In Ohio, but hardly any where else, she is allowed to make a *will*, if haply she has any thing to dispose of. On the ground of an indissoluble union of interests, and in order to prevent connubial harmony and con-

(a) But if they unite in selling land, and the proceeds be invested in other land, taking the title to the husband, it becomes his and descends to his heirs. *Ramsdall v. Craighill*, 9 Ohio, 197.

fidence from ever being disturbed, it is a general rule of law, that neither the husband nor wife can, in any case, civil or criminal, be a witness for or against the other; an exclusion which belongs to no other of the domestic relations. This rule sometimes produces hardship, but on the whole is supposed to be salutary. There are but two exceptions, which grow out of the necessity of the case. The one is where the wife has acted as the agent of her husband in business matters; the other, where she has received personal violence from him. In these cases, and these only, if there be no other witness, she is permitted to testify. Nor does the general exclusion continue only during coverture; it lasts for ever, with respect to all matters which transpired during coverture; in order that there may be every motive for the most unlimited mutual confidence.

§ 105. *Divorce.* (a) It has always been deemed the policy of the law, to hold marriage as nearly indissoluble, as the nature of the case will admit; and therefore, unlike other contracts, marriage cannot be cancelled or dissolved by the consent of the parties. They may indeed agree to live separately, but the law still regards them as husband and wife. They can only cease to be such, by *divorce* or by *death*: and it is generally agreed that divorces ought not to be granted, but upon very urgent and pressing reasons. But on this subject there is great diversity of legislation in the different states: and as a general remark, the English are much more strict in their requisitions than we are. In Ohio the liberal doctrine has been carried so far, that a proposition was once discussed in the legislature, submitting all questions of divorce to the discretion of a jury; but fortunately we have stopped a little short of this. In Ohio the cognizance of divorce and alimony is given to the supreme court and court of common pleas, sitting as court of chancery. Practically, this seems not to be understood as excluding the legislature, which has often undertaken to grant divorces, though this would seem to be unconstitutional, as an assumption of judicial power. The causes of divorce as defined by statute, are as follows:—1. Either party having a former husband or wife living. 2. Wilful absence of either party for three years. 3. Adultery of either party. 4. Impotence. 5. Extreme cruelty. 6. Imprisonment in the penitentiary. 7. Fraud in the marriage contract. 8. Habitual drunkenness for three years. 9. Gross neglect of duty. These are the only causes expressly specified in the act relating to divorce; but there are probably two other causes; namely, being nearer of kin than first cousins; and being under the marriageable age. These causes render the parties incompetent to marry; and the only doubt is whether void marriages can be the subject of divorce: but as the statute has expressly provided for one such case,

(a) See the 27th lecture of Kent.

where there is a former husband or wife living, I see no reason why these should not be placed on the same footing. Of the above named causes of divorce, the only three which are vague and liable to doubt, are, extreme cruelty, fraud in the contract, and neglect of duty. With respect to extreme cruelty, it is held that there must be personal violence to constitute it: mere austerity of temper, rudeness of language, or grossness of behavior, will not be sufficient. With respect to fraud, it is held that where a female, at the time of marriage, is pregnant by another man and conceals the fact, it is a case of fraud. With respect to neglect of duty, it must be so flagrant as to shock almost any conscience, or it will not be held sufficient. And generally, whatever be the cause, if it has been forgiven, and the parties have been reconciled and lived together, a divorce will not be decreed. Nor will it in any case be decreed where the applicant is living in a state of adultery. (a) Up to 1833, the court had a discretion to grant a partial divorce, *a mensa et thoro*, or a total divorce, *a vinculo matrimonii*; but since that time, partial divorces have been done away; and the courts either dissolve the contract altogether, or not at all. But a wife may still file her petition for *alimony*, without praying for a divorce. Doubts have sometimes been intimated whether divorce laws do not impair the obligation of contracts, within the meaning of the constitutional prohibition; but the better opinion is, that they do not; because they only liberate one party from a contract, when it has been broken by the other. A much more questionable point is, whether divorces are not made too frequent in Ohio, for the good of society. (b) It is indeed difficult to fix upon the exact medium in such cases. On the one hand, to hold the marriage contract dissoluble for slight causes, must operate as an encouragement to matrimonial strife and contention; and on the other, not to hold it dissoluble for any cause, would often occasion intolerable suffering. Perhaps the true medium would be somewhere between the severity of the English law, and the liberality of our own. With respect to *foreign divorces*, a great diversity of opinion exists in the different states; but as our statute expressly authorizes divorces to be granted, when the marriage took place, or the cause of divorce occurred, out of the state, we are bound to recognize the full validity of foreign divorces.

The mode of proceeding properly belongs to the sixth part of these lectures, and will be there described. In the mean time I may here remark, that the application for divorce is, in most respects, a chancery proceeding. But to avoid the possibility of collusion between the parties to procure a divorce, their confessions can only be received in evidence, when there is no reason to suspect

(a) *Mattox v. Mattox*, 2 Ohio, 234; *Wright's Rep.* 284, 763, 563, 212, 630.

(b) See 1 *Western Law Journal*, 170.

connivance, fraud, or other improper means or motive. And as the inclination of wise judges is against granting divorces where they can be refused, the case must be fully made out, in order to succeed. Should it appear necessary during the pendency of proceedings, to provide for the support of the wife, the court will make an order for that purpose, and the allowance may be made large enough to enable her to carry on the suit; (a) and in the final decree, permanent provision is made for the wife, if she deserve it; and for the custody of the children, if there be any.

When husband and wife are divorced, they become single persons, to all intents and purposes; but by express provision, their children are not thereby rendered illegitimate, whatever may be the cause of divorce. Indeed it may be questionable, whether our law regards any marriage as void *ab initio*; and if not, the children would be legitimate without such provision. If the divorce be for the fault of the husband, the wife is restored to all *her realty*, and receives such part of her husband's property, as the court shall think proper. This would seem to cut off his right *by curtesy*, to be described hereafter. If the divorce be for the fault of the wife, she is barred of her *dower*, to be described hereafter; and the whole provision to be made for her rests in the discretion of the court. The custody of the children, as before remarked, is also provided for by the court.

§ 106. *Rights of the survivor in case of death.* When the husband dies, the most important right of the widow is that of *dower*, which will be particularly described when we come to treat of property. Suffice it here to say, that it includes a life interest in one third part of all the *realty* owned by her husband at any time during the coverture; and of this no separate act of his can deprive her. In the worst shipwreck of his affairs, this is her plank of safety, unless she has with her own hand cast it away. If she lose her dower, it can only be by her own voluntary act. She may also remain in the *mansion house* one year free of charge, unless her dower be sooner assigned, in the way to be described hereafter. In England the period was only forty days, which was called her *quarantine*. With respect to the *personalty* of her husband, she is entitled to a reasonable allowance for the support of herself and the children under fifteen years of age, for one year, to be set off by the appraisers; and if the *personalty* be not sufficient, it may be charged upon the *realty*. She also has a right to use a variety of household articles specified in the statute so long as the minor children live with her, and if there be no minor children, they are hers absolutely. These rights take precedence of all the husband's debts except for the last sickness and funeral. After the debts are paid, if there be no children, she has all the residue of the *personalty*. If there be

(a) Wright's Rep. 104, 120, 245, 308.

children, she has one half of the first four hundred dollars, and one third of the residue. With respect to the property which was originally hers, if there be no *curtesy*, she at once resumes her control over the realty; and if there be any of her choses in action, not reduced to possession by the husband, they again become hers. (a) She also has the first claim, if she be a suitable person, to administer upon the estate, and be guardian of the children.

When the wife dies, the husband acquires an important right, somewhat analogous to dower, which is called *curtesy*, and will be described hereafter; suffice it here to say, that it includes a life interest in all the *realty* belonging to the wife, provided there were issue of the marriage born alive. As to her *personalty*, we have seen that, with the exception of choses in action, it is already absolutely his, by the mere fact of marriage. And as to her choses in action, they become his by being reduced to possession. If before her death he has not reduced them to possession, he may by the common law do this as administrator, and so make them his. But under the law of this state, I doubt if this be the case. He may act as her administrator, and so collect her debts; but when collected, it would seem that they must be disposed of as assets are in all other cases of administration.

Finally, when husband or wife dies, and there is no relative of the deceased, however remote, to inherit the property, the survivor is the *heir*. Why the most distant relative that can be hunted up, should thus be preferred as heir, before the nearest and dearest of all human relatives, I cannot understand; but so it is; and husband and wife can only be heirs to each other, when no other heir can be found, and when the property would otherwise *escheat* to the state.

I have thus taken a general view of the relation of husband and wife; and the sum is this:—Woman, married or single, has no political rights whatsoever. While single, her legal rights are the same as those of man. When married, her legal rights are chiefly suspended. When she becomes a widow, these rights revive, and liberal provision is made for her support; but from first to last, man has the advantage. Blackstone closes his chapter with an eulogium on the laws of England for their liberality towards woman. How little this is deserved, is manifest from what has already been said. Our law is vastly more liberal towards woman than the English law; yet even here she has

(a) It was formerly held that a judgment recovered by the husband was not a reducing to possession, so as to cut off the wife's survivorship, without execution; but that a decree alone was sufficient. But the rule would now seem to be, that if the husband sue alone, either a judgment or decree cuts off the wife; and if he join the wife in the suit, then neither cuts her off. When, however, the husband or his creditors go into equity to subject the choses in action of the wife, that court will go very far to protect her interest, and secure her a support. 2 Kent, 137—143; Clancy on Husband and Wife, 115.

too much reason to regret that her lot has not fallen under the dominion of the civil law. I can see neither policy, justice, nor humanity, in many of the legal doctrines with respect to married women. But there is one evil in the system which pre-eminently calls for correction. I refer to the entire helplessness of a married woman, when her husband becomes a prodigal or spendthrift. If he take care to give no cause of divorce, she has no means of providing against the utter ruin which she sees approaching. He may squander a personal estate worth a million of dollars, and leave a wife and children paupers, and the wife cannot, in this state, invoke the aid of a court to prevent it. Some of the other states have provided for such a case; others have secured to her use her own separate property, whether personal or real; and there is evidently a strong tendency in public opinion towards securing to her some of the more important legal rights.

LECTURE XV.

PARENT AND CHILD. (a)

§ 107. *Legitimate and illegitimate children.* The relation of parent and child, though in itself the most interesting that can be contemplated, is not, professionally speaking, a subject of very great importance. The law has, in fact, very little to do in regulating this relation. The sentiments of natural affection and moral obligation are so efficient for this purpose, that the sanctions of law are for the most part dispensed with; and this has become more and more the case, in proportion as mankind have become more civilized. The difference, in this respect, between ancient and modern times, is remarkable. From unlimited authority over the person, property, and even life of the child, the parent is now curtailed to a very guarded and qualified authority over the person, during the years of minority. And even this authority finds but little aid in the law to enforce it in case of resistance. In a word, parental authority, and filial obedience are left as they should be, to the law which nature has written upon the heart. In very recent times we may discover changes in this respect, showing a regular tendency towards the doctrine of non-interference, by legislators, in domestic affairs. Among the earliest laws adopted in this territory, in 1788, is one providing that if a child or servant should refuse "to obey the lawful commands" of a

(a) See 2 Kent, lec. 29; 1 Blackstone, ch. 16; 1 Swift, ch. 6; Reeve's Domestic Relations; Bingham on Infancy; Macpherson on Infancy.

parent or master, upon complaint to a magistrate, the offender might be sent to jail, "there to remain until he should humble himself to the satisfaction of the parent or master." And if a child or servant should "presume to assault or strike" his parent or master, upon complaint to two or more magistrates, the offender might be whipped, not exceeding ten stripes. What would be thought of such a law at the present day? The legislature would not deign to discuss a provision of this kind.—But I proceed to the few legal matters that require notice under this head.

Though the law of parent and child is said to be founded in nature, yet it makes a broad distinction between *legitimate* and *illegitimate* children. By our law legitimate children comprehend all those whose parents were married, whether lawfully or not, at the time of their being begotten or born; or who married afterwards. This is much more liberal than the English rule, which requires the marriage to precede the birth, and which bastardizes the issue of all unlawful marriages. Here, on the contrary, it is expressly provided, that if the offending parents afterwards intermarry, and acknowledge their children, they thereby become legitimate; and that the issue of marriages deemed null in law, shall nevertheless be held legitimate. In the same spirit, and nearly to the same effect, is another provision, declaring that no divorce shall render the children illegitimate. The justice and humanity of these provisions cannot fail to strike every mind. How cruel and unreasonable the law, which would visit the sins of the parents, upon the unoffending offspring of their unlawful intercourse. And on the other hand, how wise and humane the law which gives to such parents the strongest of motives to repair, by subsequent marriage, the wrong they will otherwise have done. Such improvements in the law cannot be too much commended. Though apparently trifling in themselves, they indicate a spirit, which, if persevered in, cannot fail to purge the law of a multitude of doctrines unsuited to the present state of civilization. It follows from the foregoing remarks, that *illegitimate* children, or *bastards*, comprehend all children whose parents never intermarried at all, or were divorced before the children were begotten. But when a doubt exists, the presumption is always in favor of legitimacy; and, therefore, if a woman have a child, within a possible time after the death or absence of her husband, that child is presumed to be legitimate. Our statute respecting bastards, (a) corresponds in the main with the English statute, as described by Blackstone. It authorizes any unmarried woman, who is pregnant or delivered of a bastard child, to go before a justice and make oath who is the father. The putative father is then brought up by warrant,

(a) For the construction given to this statute, see 8 Ohio, 377, and Wright's Rep. 464, 564, 690.

and the examination is taken in writing. If he can compound with the mother, and will give bond to the overseers of the poor, for the maintenance of the child, the matter ends there. If not, he is bound over to appear at the next court, where the issue is tried on a plea of not guilty. The former examination is given in evidence, and the mother may testify further. If the jury find that he is guilty, the court adjudge him to be the "*reputed father*," and fix the amount of maintenance, and times of payment; and unless he give satisfactory security therefore, he is committed to jail. If the mother will not proceed against the father in the way here pointed out, the overseers of the poor may. From the nature of the proceeding, it will at once be seen, that even an innocent man once accused, has very little chance of establishing his innocence. The most important point of difference between legitimate and illegitimate children, is that which relates to the right of inheritance. The general rule is, that children are the first heirs to their deceased parents; but in England bastards are held to have no inheritable blood. They can neither inherit themselves, nor be the medium of transmitting inheritance to others. We have so far modified this doctrine, as to allow them to inherit and transmit inheritance on the part of the mother, who can always be known with certainty. But with respect to the father, the law is unchanged, and they cannot inherit from or through him. The general subject of inheritance will come up hereafter. In this connection it is sufficient to say, that *posthumous* children inherit in the same manner as if born during the father's life; that no preference is given to sons over daughters, nor to the eldest son over the rest; and that the arbitrary rule, that property can never lineally ascend, is done away; so that parents may be heirs to their children.

§ 108. *Rights and duties of parents.* (a) Blackstone and other writers lay down the duties of parents towards their children, as consisting in their *maintenance*, *protection*, and *education*. There can be no doubt that these are duties of the highest moral obligation; and he would be an unnatural parent, who should be false to them, having the ability to perform them. But it is certainly a mistake to say that they are duties of strict legal obligation, unless there be a statute to that effect. Such they are not, because the common law furnishes no means of enforcing their performance, or punishing their non-performance. On this subject, writers seem to be beguiled by their good feelings into singular misapprehension, or inexcusable vagueness of expression. How can you compel a parent to maintain, protect, or

(a) 1 Black. 446; 2 Kent, 189; *Inhabitants &c. v. Mendez*, 1 Raymond, 699; *Cooper v. Martin*, 4 East. 76; *Mills v. Wyman*, 3 Pickering, 207; *Stanton v. Wilson*, 3 Day's Cases in Error, 37; *Van Valkenburg v. Watson*, 13 Johns. 480; *Edwards v. Davis*, 16 Johns. 281.

educate his child? The common law furnishes no means of doing it; and as the test of legal obligation is the means of enforcing it, this proves that the legal obligation does not exist. First, as to *maintenance* or *support*, our statute seems to pre-suppose that there are no means of compulsion, by authorizing the township trustees to bind children out, when their parents shall not provide for them; and the principle that a parent may by will disinherit a child, or may do the same thing by giving all his property away during his life, leads to the same conclusion. It may even be doubted whether, if a parent should, without reason, turn his child out of doors, and a stranger, knowing this, should provide for the child, he could recover payment from the parent. Next, as to *protection*, a parent may certainly go as far in defending his child from harm, as in defending himself. The law permits him so to do; but it does not undertake to compel him so to do, or punish him for not so doing. And, lastly, as to *education*, the same is true. A parent of the most unbounded means, may, in spite of the law, bring up his children in the most deplorable ignorance. The truth therefore is, that these are not matters of legal obligation. The law has left them to the strong impulses of natural affection. Whether wisely or not, is a question I need not discuss. The fact is all that I am now concerned with. And on the other hand, the parent's power over the child, is very little aided by law. The father is the *natural guardian* of the minor children; in which capacity, he has the custody of their persons, but not of their property. He may correct them with moderation, bind them out to service, receive their earnings, and forbid their marrying. He may also by will appoint for them a *testamentary guardian*, with powers extending to their persons and property. This is a singular instance, in which a person may delegate a power which he does not possess. The father, unless legally appointed guardian, cannot control the separate property of his minor child, except it be earned by the child's labor; but he may by will confer this power on another. Finally, at majority, or when a daughter marries, all power of the parent over the child ceases; and the child, to all intents and purposes, becomes emancipated from parental control. (a)

(a) In the text I have purposely abstained from details. The right of custody of a minor child is not absolute, like that of property. The law looks mainly to the good of the child, and if a better custody exists than that of the father, the law will not disturb it. The usual mode of testing the right of custody is by *habeas corpus*. 2 Kent, 194, 205. The father's right to the earnings of the child, is founded upon the fact of support and protection. If therefore the father agree with the child that he shall have his time, or send him out into the world to provide for himself, he cannot claim his earnings. 2 Kent, 193, 194; 1 Black. 453. The father is not bound by the contract of the child, even for necessities, nor liable for his torts, unless an actual authority be proved, or implied from circumstances. *Baker v. Keen*, 2 Starkie, 501; *Van Valkenburgh v. Watson*, 13 Johns. 480. On the ground of a right to the services of a minor child, the father may sue for a tort committed upon such child. *Hall v. Hollander*, 4

§ 109. *Rights and duties of children.* These may be inferred from the foregoing statements. Like those of parents, they are chiefly of moral obligation, and not a subject for these lectures. We have no legal provision for compelling even an affluent child, after majority, to support an indigent parent. In some places there is such provision, extending even to grand-children; and it might, perhaps, be well if we had it; but as our law stands, the child or grand-child cannot be compelled to support the parent or grand-parent, even to save them from the poor-house. Thus filial, like parental duty, is left by the legislature, to depend upon natural affection. The parent may invite the love, respect, obedience, and support of the child; but the law will not help him to command them. During minority, if the child live with the parent, and there be no agreement to the contrary, the parent is entitled to his labor and earnings; but, by statute, if the child be bound out as an apprentice, any money stipulated for in the indenture, must be secured to the child. If an adult child continue to reside with his parents, and live and labor in common with the family, there is no implied contract to pay him wages, and he can only claim them under an express contract. (a) The child can only bind the parent by his contracts, or make him liable for his torts, when acting under his authority. The mere relation involves no such liability. Nor do the legal relations of parent and child extend to those of step-parent and step-child, unless by statute.

The course of our observations upon this relation of parent and child, naturally suggests a remark or two, upon the proper scope of legislation. We have seen that the law interferes very little between parents and children; much less, in fact, than it formerly did. And why is this? Is it not because the world is learning to estimate more truly the nature and value of personal liberty? The complaint has always been, that the world was too much governed; that the law interfered too much in matters which did not concern the public, and ought therefore to be optional. This complaint has been well founded. Perchance it would not be without some foundation even now; but the tendency of legislation is certainly encouraging, in this respect. Men are more and more permitted by government to manage their own affairs in their own way. This is strikingly manifested in the absence of legislation with respect to parent and child; and therefore I have remarked upon it here. But we shall have frequent occasion in the course of our inquiries, to notice the same tendency in other matters; and it is a happy tendency.

B. & C. 660. And in case of the seduction of a daughter, the slightest proof of service will be sufficient. 2 Leigh's Nisi Prius, 1462. When a minor daughter marries, the rights of the parent are transferred to her husband; and the parent would be liable to damages for wrongfully depriving the husband of such rights. Wright's Rep. 636.

(a) Wright's Rep. 89, 133, 517, 751.

The true light in which to regard government, is that of a necessary evil. Some degree of government we must have, to preserve social order; but the less we have of it the better, provided individuals will keep themselves in order. That is the happiest condition of society, in which the operations of government are the least felt in private affairs. Like the atmosphere which supports us, we are the best off with respect to it, when we have the least reason to be conscious of its existence.

LECTURE XVI.

GUARDIAN AND WARD. (a)

§ 110. *Appointment of guardians.* The relation of guardian and ward is not founded in nature, like that of parent and child; but owes its origin to legal provision. When a person is not in a condition to take proper care of himself or his property, the law provides that some other person shall act for him in this behalf. The person thus designated is *guardian*, and the person placed under his care, *ward*. And all the provisions of law which govern the relation thus created, flow naturally from this general object of creating it. The guardian is authorized to act for his ward, only in those matters where the law requires that there should be action, and the ward is incapable of acting for himself. Beyond these limits he cannot act at all; and even within them, his action is carefully controlled by law, so as to leave as little latitude as possible, for the exercise of discretion. There are three classes of persons whom the law presumes to be incapable of taking care of themselves, and therefore places under guardianship; namely, *infants*, *idiots*, and *lunatics*. To these may sometimes be added a fourth class, namely, *deaf and dumb persons*; and in some of the states, but not here, there is still another class, namely, *spendthrifts*. For these classes, therefore, the law appoints guardians, or provides for their appointment. A father, in contemplation of death, is permitted to appoint, by will, a guardian for his minor children; and such guardian is thence called a *testamentary* guardian. But in all other cases under our law, guardians are appointed by the court of common pleas, and may be called *statutory* guardians. In the books of common law, we find three sorts of guardians spo-

(a) See 2 Kent, lec. 30, 31; 1 Blackstone, ch. 17; 1 Swift, ch. 7; Reeve's Domestic Relations. It is singular that we have no treatise expressly on this subject.

ken of; namely, guardians *by nature, for nurture, and in socage*. But here, these distinctions are entirely useless; for though we speak of the father as the natural guardian of his minor children, yet, until he becomes a statutory guardian, his authority reaches only to their persons, and not to their property. The relation of guardian and ward, therefore, cannot be said to exist, until a testamentary or statutory guardian has been appointed. The other descriptions of guardians belong to the feudal system, with which happily we have very little concern. I proceed therefore to speak of the legal condition of the persons who may be placed under guardianship; of the persons who may be appointed guardians; and of their powers and duties.

§ 111. *Infants.* (a) In this state, all males under twenty-one years of age, and all females under eighteen, are called *infants* or *minors*. In England, and in most of the states, the age of majority is the same for both sexes, namely, twenty-one. In other countries, it varies from this to twenty-five, and perhaps more. It is necessary to fix upon some age of legal emancipation, and perhaps twenty-one is as suitable as any. No period of minority could be selected, which would be adapted equally to all; because some arrive at maturity much sooner than others. But taking the average, at the present day, twenty-one years is at least long enough. During this period of minority, the law places infants under various disabilities, founded on their presumed want of judgment or discretion. They have no political rights, that is, they cannot vote, nor hold office, nor act as jurors. They cannot make *deeds* or *wills*. They cannot marry without the consent of their parents or guardians; and under the ages of eighteen for males, and fourteen for females, they cannot marry at all. They cannot appoint attorneys, and therefore can neither sue, nor defend suits in their own names. If they have no guardian, they may sue by their next friend, technically called *prochein ami*; but they can only defend by guardian. Minority is here no ground for delaying suit; and the court at once appoint a *guardian ad litem* to defend for them. The *contracts* of minors are not *absolutely void*, like those of married women, but only *voidable*. During minority a court will not uphold such contracts, unless clearly beneficial to them; and after majority, such contracts may be disaffirmed and avoided, unless they were for *necessaries* honestly furnished. This rule is designed to protect infants against imposition; and contracts for necessaries are therefore excepted, because the reason of the rule does not embrace them. But as to all other contracts, they have the option to affirm or disaffirm them on becoming of age. The only acts of minors, with respect to which they are placed on the same footing as adults, are *crimes*. From the moment they are able to discern

(a) See Bingham on Infancy; Macpherson on Infancy.

between right and wrong, infancy ceases to form an excuse for crimes; at least this is the general rule; and the few exceptions will be stated when we come to treat of criminal law. When testamentary guardians have been appointed, their authority continues until majority; but in all other cases, males at the age of fourteen, and females at twelve, have a right, with the approbation of court, to choose their own guardians, and it has been held in this state, that the power of guardians previously appointed, ceases of course, when the ward arrives at the age of choice. (a) It may be remarked, in general, that if any one of the acts, which infants are disabled from doing of themselves, are requisite to be done to protect their interests, they are to be done by their guardians.

§ 112. *Idiots, lunatics, and deaf and dumb persons.* (b) Persons laboring under mental incapacity are of two kinds, namely, those who have no intellect, and those who have one in a deranged state. As to the former, whether the want of intellect exist from birth, or be occasioned by some subsequent cause, we may call them *idiots*, though this term is usually restricted to persons born without mind. But in either case the result is the same. Here is a lack of mental power, a deficiency of intellect. As applied to crimes, the criterion is inability to distinguish right from wrong. As applied to civil matters, the criterion is inability to understand common things, or manage common affairs. There need not be a total want of mind, but only such a degree of weakness or imbecility as to require guardianship.

The other class, including those who have intellect, but in a deranged state, may be called *lunatics*. There need not be frenzy or raving madness, such as to require confinement, but only a derangement, greater or less, of the reasoning faculties. And here the true criterion is *delusion*, which consists in believing without evidence, acting without motive, reasoning without premises, and treating fancies as realities. It is not enough that the delusion have an insufficient basis. It must have no basis at all; and it must so thoroughly possess the mind as to become a fixed idea, out of which the subject cannot be reasoned. This kind of

(a) *Perry's Lessee v. Brainerd*, 11 Ohio, 442.

(b) See treatises on insanity by Collinson, Highmore, Shelford, Stock, Burrows, Pritchard, and Halsam; treatises on medical jurisprudence by Chitty, Beck, and Ray; and for leading cases, *Hadfield's case*, 1 *Erskine's Speeches*, 499; *Greenwood's case*, 13 *Vesey*, 89; *Singleton's case*, 8 *Dana*, 315; *Fulleck v. Allinson*, 3 *Haggard*, 527; *Dietrich v. Dietrich*, 5 *Serg. and Rawle*, 208; *Paske v. Ollat*, 2 *Phillimore*, 323; *Dew v. Clark*, 1 *Addams*, 279, 2 *Add.* 102, 3 *Add.* 79; *Groom v. Thomas*, 2 *Hagg.* 433; *Johnston v. Moore*, 1 *Littel*, 371; *Shropshire's case*, 5 *J. J. Marshall*, 92; *Marsh v. Tyrrell*, 1 *Hagg.* 133, 2 *Hagg.* 84; *Billinghurst v. Vickars*, 1 *Phill.* 187, 199; *Ingram v. Wyatt*, 1 *Hagg.* 94, 384; *Wheeler v. Alderson*, 3 *Hagg.* 574; *Williams v. Goude*, 1 *Hagg.* 577; *Morgan's case*, 7 *Paige*, 236; *Stewart v. Lisenard*, 26 *Wendell*, 255; *Odell v. Buck*, 21 *Wend.* 142; *Jackson v. King*, 4 *Cowen*, 207; *Gardner v. Gardner*, 22 *Wend.* 532; *Clark v. State of Ohio*, 12 *Ohio*, 483; *Commonwealth v. Rogers*, tried at Boston in 1843, and reported in pamphlet.

insanity may be either total or partial. There may be a general delusion upon all subjects, or only upon one or more subjects. The latter kind is called *monomania*. Here reason is not wholly dethroned, but delusion sits beside her. The mind is not wholly darkened, but only some of its apartments. The monomaniac may be perfectly sane on all subjects but one, and perfectly wild on that. And it is chiefly with respect to this kind of insanity that difficulties arise in jurisprudence. With respect to crimes, it is now settled, that monomania is no excuse, unless the delusion be directly connected with, and the cause of the crime. With respect to civil matters, such as contracts and wills, the better opinion is, that monomania will not set them aside, unless it be so directly connected with them, as either to have wholly produced, or essentially modified them.

There is another kind of insanity, called *moral* by medical writers, which exists when there is no intellectual delusion, but only a perversion of the moral sentiments and affections. But this has never been recognized in jurisprudence, and I trust never will be; because it would not only furnish an universal apology for crime, but introduce the utmost uncertainty into civil transactions.

I may here say a word upon the subject of *drunkenness*. This is not regarded by the law as insanity, though it may lead to it. Hence mere intoxication is no excuse for crime; though where a particular state of mind must exist in order to constitute a crime, it may perhaps be taken into view in determining whether such state of mind existed. But as to contracts, the rule now is, that if a man be so drunk at the making of a contract, as not to know what he was about, the contract is void.

As to *deaf and dumb* persons, it by no means follows that they are incapable of taking care of themselves. On the contrary, under the present provision made for educating them, they are enabled, by signs and by writing, to do almost every thing which persons blessed with speech and hearing can do. Of course the fact of being deaf and dumb does not of itself invalidate civil acts, nor excuse crimes. Our statute, however, provides for such as are incapable of managing their affairs, in the same manner as for idiots and lunatics.

The substance of our statutory provisions is this. Upon application to an associate judge, by any relative, overseer of the poor, or other inhabitant of the township, he is empowered to call a jury of five persons not of the same township, to hold an inquest. If the jury find that the person complained of is an idiot or lunatic, they certify whether he is a pauper or not, and whether he ought to be confined or not. If they find that he is an idiot and pauper, he is committed to the charge of the overseers of the poor. If they find that he is a lunatic and pauper, and ought to be confined, he is committed to jail until he can be

received into the lunatic asylum. If they find that he is an idiot or lunatic, but not a pauper, and not requiring confinement, the associate judges appoint a guardian (*a*) to take charge of the person and property of himself and his children. When a person indicted for homicide is acquitted on the ground of insanity, the jury are to specify this in their verdict; and if the court think it would be dangerous for him to go at large, he is committed to jail until he can be received into the asylum. In all cases, when there is reason to believe insanity has ceased, provision is made to ascertain the fact by inquest, and restore the party to his rights.

§ 113. *Powers and duties of guardians.* (*b*) Any person may be a testamentary guardian, whom the testator may think fit to appoint. But no executor or administrator of an estate in which a minor is interested can be his statutory guardian. Guardians are required to give bonds with security, in such sum as the court shall determine, for the faithful discharge of their duty, before the *letter of guardianship* is granted; and being amenable for all their doings to the court appointing them, they are liable to removal on good cause shown. Within three years from their appointment, and at subsequent intervals of two years thereafter, guardians of minors are required to *settle their guardianship accounts* to the approval of the court, for which purpose they must be filed one term beforehand, and public notice thereof given by the clerk, in order that any person interested may file objections. The settlements thus made are final, unless the ward within two years after becoming of age, see fit to question them by a proceeding in chancery. In case of neglect, a settlement will be enforced by citation and attachment. The compensation of guardians for their services, is a matter wholly in the discretion of the court. The general rule is, that they cannot speculate for their own advantage, with the funds of their wards; that all profits must be accounted for by them; and that if they neglect to make interest on money in their hands, without good reason, they are nevertheless chargeable with interest. If the delinquency be gross, they are chargeable with compound interest. (*c*) Their power over the *persons* of their wards, is the same as that of parents over their children, with this exception, that they cannot bind them out by indenture, without the approbation of the court. Their power over the *personalty* of their wards, is the same as that over their own; except that they cannot bind their wards by future contracts, without special provision of law. Their power over the *realty* is not so extensive. They have the management of it, and of the rents and profits of it, and may bring trespass

(*a*) And such guardian may sue in his own name. 1 Western Law Jour. 454.

(*b*) For the judicial constructions of our statute, see 2 Ohio, 401; 6 Ohio, 118; 7 Ohio, part 1, 223, and part 2, 104; 8 Ohio, 227; 9 Ohio, 19; Wright's Rep. 119, 200, 390, 562, 657; 11 Ohio, 442.

(*c*) Armstrong v. Miller, 6 Ohio, 118; 2 Kent, 231 and note.

and ejectment in their own names; but they cannot sell it, as they can personalty, without express leave of court; and this leave will not be granted, unless the court is satisfied that such sale will be for the advantage of their wards, or is necessary for their maintenance. Indeed this is going further than is generally allowed. In most places, the realty of minors can only be sold for their maintenance; but here, by special provision, it may be sold for the purpose of making a better investment. The mode of proceeding will be described hereafter. On the whole, perhaps this is well; for it often operates injuriously upon the interests of the community, as well as of the minors, that their realty, especially when unimproved, should be tied up from sale until their majority; but still it is rather a departure from the general policy of the law relating to minors, which is, to leave every thing as far as possible in the condition in which it happens to be, until they become of age to change it. This power to sell real estate is extended by our statute to guardians of minors residing out of the state, upon their giving additional security, if required.

LECTURE XVII.

MASTER AND SERVANT. (a)

§ 114. *Apprentices.* The title of *master and servant*, at the head of a lecture, does not sound very harmoniously to republican ears. And in fact, *servitude*, strictly so called, does not exist in this country, except in the case of *slaves*, nor in this state at all. But the legal relation of master and servant must exist, to a greater or less extent, wherever civilization furnishes work to be done, and the difference of condition makes some persons employers, and others laborers. In fact, we understand by the relation of master and servant, nothing more or less, than that of *employer* and *employed*. It is therefore a relation created by contract, express or implied, and might properly be treated under the head of contracts; but custom has placed it among the personal relations, and I shall so treat it. Blackstone divides servants into four classes, namely, *menial servants*, *common laborers*, *apprentices*, and *agents*. But there is no occasion here for treating separately of the two first; because we have no provisions, as in England, relating to the duration of the contract, the

(a) See 2 Kent, lec. 37, 41; 1 Blackstone, ch. 14; 1 Swift, ch. 8.

amount of wages, the time of laboring each day, and the like ; all such matters being here settled between the employer and the employed, as matters of contract. And if there be no express contract, the law implies one, on the part of the employer, to pay a reasonable compensation, and on the part of the employed, to possess and use reasonable skill and diligence. We have therefore but two classes of servants to speak of, namely, *apprentices* and *agents*. With respect to apprentices, our law is chiefly statutory. Our bill of rights declares as follows. "There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted ; nor shall any male person arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration received, or to be received, for their service, except as before excepted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the state, or if made in the state where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships." So far as this declaration relates to *slaves*, it has already been considered. With respect to *apprentices*, the provision includes both *infants* and *adults*. Males can only be bound until twenty-one, and females only until eighteen. Beyond these ages they may bind themselves for any length of time, if they enter freely into the indenture, and there be a bona fide consideration for the binding. But distinction is made between white and colored adults. As to the latter, an indenture made out of the state is void, and an indenture made within the state, for more than one year, is void. Our statute in relation to apprentices only includes infants, and does not discriminate between white and black. It specifies "*clerks, apprentices, and servants*," and places them all on the same footing. The kind of occupation, therefore, is of no consequence ; the words being broad enough to include every description of service. The mode of binding is by *indenture*, and the time is during *minority*. The minor is not, as at common law, required to be a party to the indenture. One of the parties must of course be the master. The other depends upon circumstances. It is the father, if living ; if not, the mother or guardian ; and if the guardian, the indenture must be approved by the court of common pleas. If, however, the minor be a destitute orphan, or if his parents do not provide for him, the township trustees have authority to bind him. The term *apprentice* usually implies one bound for the learning of some particular trade ; but I shall use it to signify any one bound according to the statute. The substance of the inden-

ture is provided for in the statute. (a) It must in all cases specify the age and term of service. If for a white person, it must stipulate for the education of the apprentice in reading, writing and arithmetic; unless the binding be for less than four years. In all cases the master must engage to give the apprentice, at the expiration of the time, a new bible and two suits of clothes. If there be any money to be paid by the master, it must be secured to the minor, and not to his parent or guardian. Nothing is said of the covenants on the other side; except that the parent, guardian, or trustees are not to be personally bound thereby, unless they expressly stipulate so to be. The master must have the indenture recorded by the township clerk within three months. On failure so to do, the minor will be discharged; but the master will still remain liable on his covenants. Having thus provided by whom and how the binding shall be made, the statute proceeds to fix a tribunal for settling disputes. The entire jurisdiction is given to justices of the peace, without appeal. They have power, on complaint of either party, to summon the other before them, and if they can effect a reconciliation, to make such order as justice requires; if not, to summon a jury of five persons to investigate the facts. If the minor be the aggrieved party, the complaint may be made by the parent, guardian, trustees, or next friend. If the jury find that the master has broken any of his covenants, or has neglected to furnish necessary food or clothing, whether agreed for or not, or has been guilty of any kind of cruelty, they assess the damages, and the indenture is thenceforth annulled. If the complaint be by the master, for the misbehavior of the minor, the jury determine whether the master ought to be discharged or not from the indenture. If so, or if the apprentice run away, the master has his action for damages against the minor. He also has his action against any person who shall entice the apprentice away, or harbor him.

Other incidents of apprenticeship. (b) I have thus far follow-

(a) *Form of Indenture.* This indenture of apprenticeship, between ———, father of ———, on the one part, and ——— of the other part, witnesseth:—That the said ———, aged ——— years on the ———, is hereby bound as an apprentice unto the said ———, from the date hereof until the ———, to learn the trade and occupation of a ———; and is faithfully to serve the said ———, and correctly to demean himself during the term of his apprenticeship. And the said ——— does hereby covenant that he will teach the said ——— the said trade and occupation of a ———, and will provide him, during said apprenticeship, with board, lodging, medicine, washing, clothing, and all other necessities suitable for an apprentice; and will teach, or cause him to be taught, reading and writing, and so much of arithmetic as will include the single rule of three; and at the expiration of said term of service, will furnish the said ——— with a new Bible and two new suits of common wearing apparel, and will pay him one hundred dollars in money. In testimony whereof, the parties have hereunto set their hands and seals this ———.

(b) *Day v. Everett*, 7 Mass. 145; *U. S. v. Bainbridge*, 1 Mason, 71; *The King v. Laindon*, 8 Term Rep. 379; 1 Salkeld, 66, tit. Apprentice; *Thompson v. Tiller*, 2 Strange, 1266; *Hall v. Gardner*, 1 Mass. 172; *Davis v. Coburn*, 8 Mass. 299; *Nickerson v. Homard*, 19 Johns. 113; *James v. Le Roy*, 6 Johns. 274; *Ex parte Lansdown*, 5 East, 39.

ed the statute. But statutes of a similar character have existed elsewhere for a long period, and many points have been decided respecting them. 1. This statute embraces only the case of minors bound by indenture, according to its provisions; but it does not, like the English statute, make void all other contracts for the binding of minors; such contracts, therefore, may still be good, on the common principles of law. 2. At common law the minor was not bound unless he became a party to the indenture; but as the statute does not require his assent, the binding here will be valid without it. 3. Apprentices under the statute, are not entitled to *wages*, unless expressly stipulated for; that is, no recovery can be had upon an implied contract for work and labor, as in the case of other servants. 4. The death of the master discharges the apprentice entirely from the indenture, on the ground that the contract is strictly fiduciary. The confidence reposed in the master does not extend to his representatives; and the apprentice is under no obligation to them. But it has been held, on the other hand, that the death of the master does not discharge his representatives from the covenant to support the apprentice, although he is no longer bound. This doctrine, however, is so utterly destitute of reason, that I should presume these ancient decisions would not now be sustained. 5. The weight of authority as well as reason is in favor of the doctrine, that the master cannot assign his interest in the indenture to another, because the contract is founded on personal confidence. It has, however, been held, that although the assignee cannot enforce the indenture against the apprentice, yet the assignment is so far valid that he may maintain an action upon it against the assignor. 6. As the rights and powers created by the indenture are derived from the statute, they can be enforced only where the statute is operative. They cease, therefore, when the master removes out of the jurisdiction, unless express provision is made for such removal, or it is required by the nature of service. 7. The master is entitled to the earnings of the apprentice under all circumstances. And it makes no difference in this respect whether the money be earned in the master's line of business or not; whether it was by his consent or not; whether the employer knew him to be an apprentice or not; or even whether he has paid the apprentice. An action will always lie by the master against the employer to recover the whole. The ground assumed is, that the master has contracted for his time, and is entitled to its avails. 8. Where a minor is wrongfully detained as an apprentice, under pretence of an indenture, he may resort to the writ of *habeas corpus* to procure his release. 9. There is nothing in this country analogous to that principle of the English law, which gives to persons who have served a regular apprenticeship at any trade, the exclusive right of practising it. 10. The power of the master over the person of the apprentice, is similar to that of the parent or guardian. If

necessary, he may correct him with moderation; but nothing more.

§ 115. *Agents.* (a) The relation of principal and agent takes place wherever one person is authorized to act for and in the name of another. It is a general rule, that whatever any person has original authority to do in his own name and right, he can authorize another to do for him as his agent; and that where power is given to accomplish any object, it includes all the means proper for that object. But there is a maxim, *delegatus non potest delegare*, which prohibits delegated power from being again delegated, without special authority from the original source; therefore an agent cannot create a sub-agent, without special permission. And on the other hand, any person may act as agent, whom the principal chooses to appoint. So comprehensive is this rule, that married women and infants, who are incapable of acting in their own behalf, may act as agents; for the appointment takes away the legal insufficiency; and enables them to bind their principals, when they could not bind themselves. The mode of appointment depends upon the nature of the agency. By a technical rule of law, the evidence of appointment must be of as high a nature as the thing to be done. Thus to execute a writing under seal, the appointment must be under seal. We have a statutory provision requiring a *power of attorney* for the conveyance of realty, to be executed with all the formalities of the conveyance itself. Our *statute of frauds*, requires the authority of agents to do certain acts therein named, to be in writing. And we have another provision, requiring attorneys at law to have a written authority to confess judgment for their clients. (b) But with these exceptions, the agency may be created orally, or may be implied from circumstances, or may be subsequently adopted, when there was no previous appointment by word or act. These remarks must be understood

(a) See 2 Kent, lec. 41, 61; and the Treatises on Agency, by Story, Livermore, and Paley.

(b) *Form of a power of attorney to transact ordinary business.* Be it known that I hereby constitute and appoint ———, to be my attorney in fact, with full authority to make all contracts, and do all other acts of a business nature, except the conveyance of real estate, as effectually as I could myself do, if personally present; and if need be, to substitute another attorney in his place with equal powers; and I do hereby ratify and confirm all acts lawfully done in pursuance of this power. Witness my signature and seal, &c.

Power to confess judgment. Be it known, that whereas ——— is indebted to ———, in the sum of \$——, for [state nature of indebtedness]; now, therefore, the said ——— does hereby authorize ——— or any other attorney at law, to appear in [describe the court, or say any court of record], at any regular term of said court, [or specify some term], and waive the issuing and serving of process, and confess a judgment in favor of the said ———, against the said ———, for the sum of \$——, with interests and costs; and thereupon, to release all error, and waive the right of appeal. Witness the hand and seal of said, &c.

If the person giving this power, be under arrest at the time, some attorney at law, acting for him, must attest the power as a witness.

to apply to *legal* and not *political* acts. One person cannot depute another to vote, or discharge an office for him; except in some few instances, where the law specially provides for the appointment of *deputies*. But we have seen that the members of corporations may delegate the power of voting by *proxy*. The law has a variety of special agents, such as *executors, administrators, guardians, trustees, masters in chancery, receivers, collectors, sheriffs*, and the like, which are elsewhere spoken of. Commerce also gives rise to a variety of agents, the most important of which are *factors, brokers, and ship-masters*. I name these various kinds of agents, for the purpose of letting you know that they exist; but in the rest of my remarks, I shall merely state the general doctrines which apply equally to all agencies. For more particular details you can consult the various titles and authors above indicated.

§ 116. *Their powers and duties.* The acts of an agent are done in the name and for the benefit of the principal; and the agent can claim no other profit than his wages, or agreed compensation. Nor does he incur any risk or liability, except for torts, so long as he keeps within his powers; but the moment he exceeds his powers, he becomes personally responsible both to the principal and to third persons. If limited by special instructions, therefore, he must adhere strictly to them; if not, he is to be governed by the established usages of his employment. By the mere acceptance of the agency, he binds himself to the principal, for sufficient skill and diligence to execute it well; and if a loss arise for the want of either, he is therefore liable for it. In dealing with third persons, he should disclose the fact of being an agent, or he will be held personally responsible to them; and in making written contracts, he must take care so to frame them as to bind his principal only, and not himself; otherwise, though his agency appear, he will be personally liable. Finally, an agent is personally responsible for all those injuries, which the law denominates *trespasses* or *torts*, though done as agent and by order of the principal; for the law will recognize no authority to do wrong, as an excuse for doing it.

§ 117. *Liability of principal.* The general liability of the principal depends upon the maxim, that the acts of his agent are his own acts—*qui facit per alium facit per se*. Hence the principal is personally responsible for whatever his agent does, in the regular course of his employment, including both contracts and torts; and this extends to all sub-agents, when the first agent has express power to appoint them: but the liability of the principal is confined to acts done within the scope of the agency; for to that extent only does he undertake with the public; and beyond that they have no right to confide in the agent. Hence it is incumbent on those who deal with agents, knowing them to be such, to ascertain the extent of their authority; whether it be

general or special, express or implied ; for beyond this authority, they cannot look to the principal. There is, however, this distinction between a general and special agency, in respect to binding the principal. A special agent, who exceeds his authority, in no case binds his principal ; but a general agent, though he act contrary to private instructions, will bind his principal, if the act done were within the general scope of the agency, and the person dealt with did not know of the private instructions. What is the general scope of the agency, must be determined by the custom of the business. And it is well settled that no general agency to sell, will authorize the agent to pledge or barter. The chief difficulty in determining the liability of the principal, arises in those cases where the agency is inferred from mere employment ; as where a common servant, for example, obtains money or goods in the name of his master. In all such cases, the rule is, that if the principal receives the benefit of the agency, he is responsible for the consequences ; and if he does not receive the benefit of it, in this particular case, yet if he has before recognized the authority of the agent, and has not countermanded it ; or if he has done any thing amounting to a subsequent ratification, he is held responsible.

§ 118. *Termination of the agency.* The appointment of an agent is revocable at any moment by the principal, unless, for a valuable consideration, the agent has acquired a vested and permanent interest in the continuation of the agency. Such powers are called *powers coupled with an interest* ; and they are not revocable at pleasure. A familiar instance is that of a power of attorney in a mortgage, to sell the land on default of payment, which will be described hereafter. Such a power would be of no value, if revocable at pleasure ; and therefore it is not so held ; but all powers not coupled with an interest, are revocable at pleasure ; and with respect to the manner of revocation, the rule is, that if the appointment was made under seal, the revocation must be under seal ; otherwise it may be either in writing or oral. But until notice of such revocation, the acts of the agent will bind the principal. The death of the principal, however, works a revocation from the moment it takes place ; although notice of the fact be not received until some time after : and this severe rule makes it hazardous to deal with an agent, whose principal lives at a distance. It would perhaps be well to alter this rule, by express provision ; so as to make the law uniform, that no power should be considered as revoked, by death or otherwise, with respect to any third person, who had previously dealt with the agent, until notice of such revocation. So the death of the agent terminates the agency, because the law does not transfer such a trust to his personal representatives. So lunacy of the principal, when ascertained by inquest, revokes the agency ; and in most

cases, his bankruptcy would have the same effect. So the marriage of a woman revokes an agency created by her when single.

I have heretofore spoken of the relation of master and servant, as one of the domestic relations; but the view now presented, shows that it belongs more properly to the business relations. It has in fact very little to do with domestics, or domestic life; and here again we have a strong illustration of the growing policy of non-interference. Our law wisely abstains from attempting to regulate the relation of master and servant, strictly so called, except where the servant is a minor, and incapable of contracting for himself. What a contrast is here presented to the laws of England, which leave hardly any thing to the discretion of the employer and the employed. There is manifestly no more reason for providing by law, what wages shall be paid, and how many hours servants shall work, and how long the contract shall continue, than there would be in prescribing what dress each person shall wear, by what title he shall be called, and how much money he shall expend. Such laws have, in fact, been tolerated in former times; and perhaps some relics of them may even now be found in England, under the name of *sumptuary laws*. But who does not feel that personal liberty must be a mere name, where all the most common affairs and relations of life are thus imperatively prescribed by law? I must be pardoned for recurring so often to this topic; for we cannot fully appreciate the value of our freedom, until we contemplate it in the absence of those vexatious details of municipal regulation, which have been elsewhere endured.

LECTURE XVIII.

EXECUTORS AND ADMINISTRATORS. (a)

§ 119. *Who may appoint and be appointed.* The relations we have been considering are those which exist among the living. We are now to consider one which results from death. When a person dies, there must be some one authorized to settle up his affairs. The law permits the living to designate who shall perform this office for them. This is done by making a *will* or *testament*, to take effect after death; the nature of which instru-

(a) See Kent, lec. 37; 2 Blackstone, ch. 32; treatises on executors by Wentworth, Williams, and Toller; Robertson on Personal Succession; Roper on Legacies; Roberts on Wills; Ram on Wills.

ment will be explained hereafter. The deceased is thence called *testator*, and the person so nominated to settle his affairs, *executor*. But if the living neglect to make such provision before death, the law undertakes to make it for them. When a person dies without a will, he is said to die *intestate*, and the person designated by law to settle his affairs, is called, *administrator*. In most places there is a distinct court for the cognizance of all probate and testamentary matters, under the name of an orphans' court, or court of probate. But here the court of common pleas discharges all these functions. The powers and duties of executors and administrators are here chiefly regulated by statute; and I shall give a synopsis of its provisions.

The only persons incapable of appointing executors, are infants, idiots, and lunatics, who are prohibited from making wills. And any person, except a married woman, may be appointed executor, to whom the testator is willing to commit the trust; though a minor cannot act during his minority. As to administrators, the directions of the statute are, that the widow of the intestate, shall be first entitled to letters of administration; next, the nearest of kin who are competent; next, any creditor who will accept the trust; and lastly, any other suitable person. The fidelity both of executors and administrators, is secured by an official oath, and by bond and sureties, in such amount as the court shall determine; usually double the value of the personalty coming into their hands. If from any cause the executorship becomes vacant, the court appoints an *administrator with the will annexed*. If the administratorship becomes vacant, the court appoints an *administrator de bonis non*, that is, *of the estate yet unsettled*. If there be a contest concerning a will or other good cause, a *special administrator* is appointed. If a will be discovered after an administrator has been appointed, he is compelled to surrender in favor of the executor therein named. The executor of an executor has no authority, as such, to settle the estate of the first testator. The time within which administration may be originally granted, is limited to twenty years from the death of the testator or intestate. Both executors and administrators are removeable for good cause. If a single woman be appointed executrix or administratrix, and afterwards marry, her authority ceases; and her husband does not acquire the power in her right, as is generally the case elsewhere. If a minor be appointed executor, he cannot act as such until majority, and provision must be made by court for the intermediate period. The proper county to make the appointment, is that in which the deceased resided; but if he were a non-resident, then any county in which he left property.

§ 120. *Their course of proceeding*. The first duty of an executor is to have the will *proved*. Until this is done, he has no authority to act. The mode of making probate will be described when we come to speak particularly of wills. After probate of

the will, the executor is to follow its directions so far as they go ; and for the rest, he is to be governed by the law regulating administrators. The next duty of an executor or administrator, is to have the *personalty* of the intestate *appraised* by three persons under oath, who are appointed by the court ; and a sworn *inventory* thereof must be returned to court, within three months from the date of appointment. Five days' notice of making this inventory and appraisement must be given to those interested in the estate. If the court so order, this inventory must also include an appraisement of the realty : but generally it will only include the moveables, debts due the estate, and money on hand, all which must be specifically set forth ; and the annual crops and emblements, whether severed from the land or not, are to be treated as moveables and included in the inventory. The only case where an inventory is not required, is when an executor is residuary legatee, and has given bond to pay all the debts and legacies. If there be property in another county requiring appraisement, a justice of the peace may appoint the appraisers. If there be a widow or minor child, certain specified articles, including clothing, pictures, books, utensils, and furniture, are given to them, and not made assets. These therefore are inventoried, but not appraised. If after making the first inventory, new assets be discovered, a farther inventory must be made. It is also the duty of the appraisers to make an *allowance* for the widow and children under fifteen years of age, sufficient for their support one year. The items of this allowance are returned in a separate schedule ; and if the personalty be not sufficient for this purpose, they certify what further sum should be allowed, and this must be made up out of the realty. The next duty of the executor or administrator, is to take measures for paying the debts. For this purpose he must notify the public of his appointment by advertisement within three months. He then proceeds to collect the debts due to the estate, which, if need be, he may compound by leave of court ; and to convert the chattels into money by a sale at public auction, upon fifteen days' notice ; unless the widow will take them at the appraisement, and secure the payment. Our statute requires that all such sales, to an amount exceeding three dollars, shall be on a credit of from three to nine months, to be secured by note or bond with two or more approved sureties. When the sale is by an executor, the chattels specifically bequeathed, are only to be sold when the other personalty is insufficient to pay the debts. The sale bill must be made out in the same order as the inventory, and specify the disposition made of each article. A return of the sale must be made within three months ; and if the proceeds thus realized from the debts and chattles prove insufficient to pay the debts due from the estate, application is made to the court for leave to sell enough of the realty to make up the deficiency. The mode of doing this will be explained hereafter.

If all the property of the deceased, which for this purpose is called *assets*, be insufficient to pay the debts, the estate is declared *insolvent*, and the entire proceeds, being converted into money, are applied in the following order. *First*, to pay the expenses of the last sickness, funeral, and administration. *Secondly*, to make up the year's allowance for the widow, and children under fifteen. *Thirdly*, to pay debts entitled to a preference under the laws of the United States. *Fourthly*, to pay public rates, duties, and taxes. *Fifthly*, to pay debts due to individuals, which are liens upon the estate either by judgment, decree, or mortgage. *Sixthly*, to pay all other debts pro rata. When a claim is presented against the estate, the executor or administrator may require, in addition to the usual vouchers, an affidavit that the claim is justly due. If such claim be allowed, the allowance is indorsed thereon. If rejected, it may by agreement, be referred to arbitrators; and if not so referred, and the estate has not been declared insolvent, it must be sued within six months, or it will be barred. Debts due to an executor or administrator must be allowed by court, and are not entitled to a preference. Debts not yet due may be paid, deducting interest for the unexpired time. If due notice of appointment have been given, and claims have not been presented within one year sufficient to show the estate insolvent, debts may be paid without liability to any creditor who has not given notice of his claim, except for his pro rata share of what may remain. But if the estate prove *solvent*, then, after paying the debts which have the first claim, the residue is to be distributed as follows: *First*, the surplus proceeds of the personalty are given to the widow, if there be no children; and to the children, if there be no widow. But if there be both, the widow has one half of the first four hundred dollars, and one third of the residue, and the children have the rest. If there be neither widow nor children, the distribution is made according to the law of *descent* and *distribution*, to be described hereafter. *Secondly*, the realty over which the administrator has no control, except it be given him by the court, for the purpose of paying debts, is divided among the widow and heirs, according to the law of *dower* and *descent*, which will be described hereafter.

The time allowed to executors and administrators, for settling estates, is eighteen months, within which time the first account must be rendered; but if there be good cause, the court may extend this time from year to year, not exceeding five in all; and even after this period the office does not expire, until the estate has been entirely settled. Within the time thus allowed, they are required to present to the court from time to time their accounts, with proper vouchers for all money disbursed where the sum exceeds ten dollars; and in case of delay, they may be compelled so to do, by citation and attachment. Their final

account is continued open for one term, subject to examination by all persons interested, who are notified thereof by advertisement of the clerk, and may file written exceptions to any of the items. The account is then *audited* by the court, and such order made thereon as the case requires. Upon *final distribution* made pursuant to such order, a return is made thereof, with *proper vouchers*, and the same proceedings are had as before. If the court allow the final settlement, an order is made to that effect; and the executor or administrator, and his sureties, are thenceforth discharged, unless within five years good cause be shown for setting such allowance aside. If the compensation of an executor have been fixed by the will, and he acquiesce therein, he can receive no other; but he may renounce that, and take the compensation fixed by law for an executor or administrator; which is, on the personalty and the proceeds of realty sold by them, six per centum on the first thousand dollars; four per centum on the excess up to five thousand dollars; and two per centum on the excess above five thousand; together with such special allowance as the court may see proper to make for extraordinary services. But in no case can they speculate upon the funds of the estate; and they are chargeable with interest when they have, or ought to have made interest.

§ 121. *Their powers and liabilities.* Executors and administrators may sue and be sued in their official capacity; but the general rules relating to actions for and against them will be considered hereafter. I will only remark, that our law presents no motive for suing them, until after the time fixed by the statute or the court for the settlement of the estate, unless the claim be one which would not be affected by the insolvency of the estate, or have been presented and disallowed; for in no other case would the person suing recover costs. All suits are barred after four years from the date of appointment, if notice thereof has been duly given, unless assets have since come to hand, or the claim accrued since, or a new administrator has been appointed; in which latter case, one year is added to the four. In no case can execution issue against an executor or administrator, without special permission of the court, and then it runs against the assets in his hands, unless he has been guilty of waste. If executors or administrators *waste* the estate of the deceased; that is, wilfully or carelessly diminish the amount of assets; they and their sureties become liable for such deficiency; but in no other case do they become personally liable, unless they voluntarily undertake so to be; and by the statute of frauds, this undertaking must be in writing. Express provision is made, that judgments against them, shall specify that they are to be satisfied *out of assets* in their hands; and that if they have occasion to appeal, they need not give bonds, as in other cases. Executors and administrators

from other states, are expressly authorized to act here, upon making application with proper exhibits; but this is an exception to the general rule, which is, that they must derive their authority from the law of the place where the property is, without regard to the domicil of the deceased.

Here terminates our view of the law of persons. There is indeed one other relation, and a very important one too, which might have been embraced in this division of lectures; I mean the relation of *debtor and creditor*; but the title is so comprehensive, that had I undertaken to discuss it, I should hardly have known where to stop. It includes in fact the greater part of what remains to be said, except that relating to crimes. Nor is it usual to class this among the personal relations, since it belongs quite as properly to the law of property, and the law of procedure, as to the law of persons.

PART IV.

THE LAW OF PROPERTY. (a)

LECTURE XIX.

PRELIMINARY CONSIDERATIONS.

§ 122. *General explanations.* In the third lecture I described the origin of title to the American continent, and traced the history of title to that portion of it which constitutes the United States. I also gave a general account of the acquisition and disposition of that vast extent of territory which constitutes our *public domain*. In the fourth lecture I described the general divisions and subdivisions of property, for municipal purposes, and defined the terms connected therewith. These it will now be useful briefly to recapitulate. 1. The term *property* includes every valuable thing which can be made the subject of exclusive ownership. 2. The most general division of property is into *things in possession* and *things in expectation*. Things in possession include all things which are under the present and immediate control of the owner. Things in expectation consist of *rights* which may require the intervention of law to render them available. To this class belong all *contracts* and *legal obligations*, which pass under the general description of *choses in action*. 3. Property is again divided into *things real* and *things personal*. Things real include every valuable thing of a fixed and immoveable nature, and pass under the general description of *lands, tenements*, and *hereditaments*, or simply *realty*. Things personal include every valuable thing of an unfixed and moveable nature, and pass under the general description of *goods* and *chattels*, or simply *personalty*; and there are certain things occupying a sort of intermediate position between the two, some of which are called *chattels real*, others *heir-looms*, and others *fixtures*. 4. Real property is again subdivided into *things tangible* and *things not tangible*. Things tangible include *land*

(a) On property in general, see the 2d book of Blackstone; 2d and 3d books of Swift; and 3d and 4th volumes of Kent. On real property, see Flintoff on Real Property; Cruise's Digest; Lomax's Digest; Hilliard's Digest; Coke upon Littleton. There is no treatise expressly on personal property.

and every corporeal thing permanently connected therewith to an indefinite extent above and below the surface; and pass under the general description of *corporeal hereditaments*, or simply *land*. Things not tangible include certain rights, privileges, or easements, annexed to land in the ownership of another, and pass under the general description of *incorporeal hereditaments*.

By the right of property I understand, in the language of Blackstone, "that sole and despotic dominion, which one man claims and exercises over the external things of the world, in total exclusion of every other individual." (a) This is the definition of *exclusive ownership*; and it has been a question of much speculation, whence this right originated; whether from nature or society. We know, as a matter of history, that in the beginning God gave to man a general dominion over the earth and all things appertaining thereto; but this would only make the first inhabitants *owners in common* of the whole, and not exclusive owners of any specific part. The historical inference, therefore, is, that exclusive ownership did not commence until some subsequent period, when a division of the common property was made, either by compulsion or voluntary agreement. In other words, the right of exclusive ownership is conventional, and not divine or natural; and the same inference results from our theory of the social compact. An island or continent, for example, which no man had ever seen, would be the property of no one; but if a number of persons should be cast upon it, and take possession, they would own it in common, until some agreement should be made concerning it; after which, the nature of their ownership, whether exclusive or common, would depend upon their agreement. In either view, therefore, it would seem that the exclusive ownership of property is a social, and not a natural right, though our state constitution declares the contrary. But the question is only of speculative interest; for whatever be the origin of the right of property, its efficiency and value depend upon the provisions of municipal law. Our security for the enjoyment of the right of property, may be considered in two aspects; with reference to government, and to each other. As before explained, we are protected against encroachments on the part of government, by the constitutional assurance, that, except in the way of regular and just taxation, private property shall not be taken for public use, without compensation to the owner; and that existing contracts shall not be impaired by legislation. And with respect to one another, we are protected against encroachment by the whole remedial force of the law, which defines our rights and redresses our wrongs. The right of property is, therefore, abundantly protected; and we shall find as we proceed, that the rules which

(a) 2 Black. chap. 1; 3 Kent, lec. 50.

govern the acquisition, enjoyment, transfer, and transmission of it, form the larger portion of the entire body of municipal law.

§ 123. *The feudal system.*(a) There was a time when real property comprehended almost every thing of sufficient importance to be the object of municipal regulation; but that time has long since passed away. In the progress of civilization, personal property has been constantly augmenting in quantity and value, until it has probably turned the scale. At the present moment, it forms a large, if not the largest part of the wealth of nations. And this difference is destined to be constantly growing greater; for while the basis of real property, that is, the surface of the globe, is limited by nature, so that it cannot be increased, the quantity of personal property, consisting of all the various commodities of life, and depending on the creative genius of man, can be increased to an indefinite extent. This fact in the history of the two divisions of property, has had an important influence upon the character of the law by which they are respectively regulated. The law of personalty, being almost entirely of modern origin, is characterized by the spirit of modern improvement; and as a body, it is comparatively simple, rational, and liberal. Whereas the law of realty, having acquired its form and shape in the days of darkness and barbarism, is characterized by a spirit almost directly the opposite; being in a remarkable degree, abstruse, technical, and artificial. He who begins with the establishment of the *feudal system*, and traces down the history of the law of real property, will do it with mingled feelings of disgust and gratification. He cannot fail to be thoroughly disgusted with the narrow, arbitrary, and mystifying spirit which dictated all the early doctrines; nor to be equally gratified with the bold, liberal and determined spirit which has since been manifested, to substitute new ones in their place. But it is remarkable with what a tenacious grasp the laws of real property adhere to the soil in which they have once taken root. Notwithstanding all the improvements which have hitherto been effected, with so much effort, this branch of law is still obnoxious to the charge of being complicated and cumbrous, to a degree totally at variance with the spirit of the age in other respects.

For the origin of the law of realty, we go back to the *feudal system*; and although for reasons which will be hereafter mentioned, we feel the influence of this system but slightly in this state; yet even here this branch of law cannot be fully understood without some knowledge of the law of feuds. I shall merely mention some of the leading features. The feudal system in its origin was purely a *military establishment*, founded

(a) On the feudal system and the doctrine of tenure, see 2 Blackstone, ch. 4, 5, 6; 3 Kent, lec. 53; Sullivan's Lectures; Wright on Tenures; Gilbert on Tenures; and the Histories of English Law, by Reeve, Hale, and Crabbe.

by conquerors. The title to the whole conquered territory vested at once in the *commander-in-chief* as the ultimate owner, who was called the *lord paramount*. By him it was apportioned, in the first place, among his *principal officers*, who *held* it of him on certain terms of *tenure*, but did not absolutely *own* it. By such *holding*, they became his *vassals*; their interest in the land thus held, was called a *feud*, *fief*, or *fee*; and the ultimate right still remaining in the lord, was called his *seignior*y. These principal officers again apportioned their respective feuds in a similar manner among their *inferior officers*, and they among theirs, until by repeated *subinfeudations*, the feuds became small enough for the purpose of cultivation. Even the lowest *feudatories*, however, did not labor upon the soil. This was the lot of the vanquished inhabitants, who were held in the most abject servitude, and called *serfs* or *villeins*. Thus the feudal system may be properly compared to a stupendous pyramid, of which the lord paramount was the vertex, and whose base rested on slaves. The most important feature in the law of feuds was that of *tenure*, as distinguished from *absolute ownership*. The terms by which vassals held their feuds, whatever link they formed in the chain of subinfeudation, were chiefly two, *fealty* and *service*. *Fealty* consisted in the obligation of fidelity to the lord; and from certain words used in the ceremony, the assumption of this obligation was called *doing homage*. This is supposed to be the origin of the oath of allegiance. *Service* was the recompense made to the lord for the use of the land, and consisted in attending him in his court during peace, and in his army during war. The mode, manner, and quantity of service were settled at the time of creating the feud; and when scribes could be found, were reduced to writing. This was the origin of the *deed of feoffment*. But the creation of the feud was not complete, until there had been what was called a *corporeal investiture*; which consisted in a *symbolical delivery of possession*, by the lord to the vassal, in sight of the land, and in presence of the neighboring vassals. This gave rise to the modern ceremony, called *livery of seisin*, which will be described hereafter. Originally feuds were only granted for the life of the feudatory; but in process of time, they began to be granted to the feudatory *and his heirs*, and thus became *hereditary*. As they were granted upon personal considerations, and created a very intimate and confidential relation between the lord and the vassal, it was a fundamental doctrine that they were *unalienable*, without mutual consent. That is, the lord could not transfer his seigniory without the consent of his vassal; nor could the vassal transfer the feud without the consent of the lord. Such were some of the leading features of the feudal system, while it retained its purely military character; and no where was that system more firmly established than in England. The progress of civilization, however, for eight centuries, has

effected many important changes. The original *military tenures* gradually gave place to *civil tenures*, such as *grand sergeanty*, *petit sergeanty*, *free socage*, *villein socage*, and divers other tenures, designated by equally euphonious names. But it would be a waste of time to dwell on these tenures, because they are now obsolete. It is sufficient, in this connection, to observe, that the mighty revolution which has gradually been effected in the law of realty, may be traced to two fundamental innovations upon the original law of feuds. The first relates to hereditary estates, and consists in substituting *absolute ownership* in the place of *holding upon terms of tenure*. The second relates to estates not hereditary, and consists in substituting a *pecuniary compensation* or *rent* in the place of *personal service*.

§ 124. *Slight traces of it here.* It was necessary to present this brief sketch of the feudal system, in order to account for the exceedingly technical character of the law of realty, and to explain the several existing doctrines to which reference must hereafter be made. At the same time it is unnecessary to give a detailed account of that system, because very few traces of it are perceptible in our law. In this respect the citizens of the new states are much more fortunate than those of the original states, to which the principles of the English law were directly transplanted. For although no feudal conquerors parcelled out the American territory among their victorious followers, yet, as we have before seen, the first settlers brought with them, as their birth-right, the general doctrines of the English common law, and among them, those feudal principles which time had not been able there to eradicate. But our historical summary has shown that this region was settled under happier auspices. The ordinance of 1787, by a few sweeping provisions, respecting the title, descent, and transfer of land, effectually prevented many of those feudal doctrines, which still cumber the land laws of the older states, from attaching themselves here. The author (a) of the ordinance has himself said "that the titles which were planted by this ordinance, in 400,000 square miles of territory, are more purely republican, and more completely divested of feudality, than any titles in the Union were at that time." In fact, the ancient notions of *tenure* do not exist here even in theory, as they do in some of the older states. Our citizens hold of no superior. What they own, they own absolutely and independently. All estates are in the broadest sense of the word *allodial*. The only provision in our law which bears the most remote analogy to the doctrine of holding of a superior is, that the people of the state, in their collective and sovereign capacity, have an ultimate right to all land, within their jurisdiction, when it so happens that there is no other legal owner; in which case, the law makes it

(a) 9 Dane's Abr. App. 77.

escheat to them; and this *right of escheat* bears some resemblance to that of the lord paramount. But it has its origin in the most obvious considerations of public policy, and can in no sense be regarded as a relic of the feudal system. We do, indeed, still retain some of the legal terms to which that system gave rise. Thus we speak of the manner of holding as a *tenure*, of the thing holden as a *tenement*, and of the person holding as a *tenant*; but we use all these terms in a modified sense. So we recognize a relation of *landlord and tenant*, respecting which, some of the rules have taken their complexion from the feudal relation of lord and vassal. But this is all; and we may therefore dismiss the subject of *tenure* as having no other than a speculative interest for us.

I have stated that the law of realty improves more slowly than any other branch of law, owing to the nature of the subject; and that much yet remains for reform, even here. At the same time, it is a matter of congratulation, that so much has been effected. I have no doubt that the law of realty in Ohio, could be written in one third of the space which would be required for the law of realty in England. The truth of this will be felt as we proceed; though it cannot now be demonstrated, without anticipation. I will however here indicate some of the leading points in which the most marked improvement has been made. 1. We have much fewer incorporeal hereditaments than the English. 2. We have none of the distinctions growing out of their manorial establishments. 3. We have none of the particular customs which prevail there. 4. The statutes of uses, of mortmain, and of entails, are not in force here. 5. All our tenancies which are not in severalty, are in common. We have no joint tenancies or tenancies in coparcenary, distinct therefrom. 6. Our conveyances are greatly simplified. 7. We have but one real action, and that is ejectment, which answers for all purposes. In these, and other similar respects, which will be enlarged upon hereafter, we have reason to boast of our improvement in the law of realty; and because we have innovated so much and so well, I shall treat this branch of law with more fulness than has been my custom hitherto.

The law which regulates the acquisition, use, and transfer of personalty, differs so much from the corresponding provisions with respect to realty, that I at first doubted whether it would not be advisable to treat the subjects separately; but upon reflection, I have concluded to treat the two in connection. The distinguishing character of personalty is, its *moveable nature*: and upon this is founded a great variety of distinctions relative to the mode of acquiring it, the evidence of ownership, the injuries which may be done to it, and the mode of disposing of it. In general it may be remarked, that in all these respects, the law of personalty is much less formal and technical, and in most of them,

much more simple and reasonable, than the law of realty. All this will be illustrated as we proceed. But in the mean time, I would call your attention to the wide compass embraced by the law of personalty. Whatever relates to the money or currency of the country; to contracts in general, and more particularly to the various commercial contracts, such as bills of exchange, promissory notes, bailments, sales, insurance, and other marine contracts; to corporations; to partnerships; and generally to the relation of debtor and creditor; all this comes more or less directly within the comprehensive scope of the law of personalty. You will not therefore expect from me any thing more than an abstract or synopsis of these various matters; with a reference to the sources whence more particular information may be had. The subjects of *commercial law* alone, occupy many volumes; while I can devote to them only a few pages; but I shall take some notice of all these subjects; enough at least to indicate how much is to be learned, and what are the landmarks to direct your progress.

LECTURE XX.

INCORPOREAL HEREDITAMENTS, EASEMENTS AND FIXTURES. (a)

§ 125. *In what they consist.* We have seen that realty includes not only those *tangible things*, which in legal contemplation, constitute *land*, but also certain *intangible rights* annexed to land, and included among *tenements* or *hereditaments*. For this reason it has been customary to make two divisions of the subject. Hereditament, being formerly the most comprehensive term, has been selected for this purpose, and the division is into *corporeal hereditaments*, and *incorporeal hereditaments*; the first including land only; and the second, every thing real which is not land. I shall first consider incorporeal hereditaments, under the name of *easements*; and then close the lecture with a brief account of fixtures. Incorporeal hereditaments comprise certain rights and privileges connected with land, but belonging to different persons from the proprietors of the land. They are not things of substance, cognizable by the senses, but exist merely in idea. In England they make a very important

(a) See 2 Blackstone, ch. 3; 3 Kent, lec. 52; Woolrych on Ways; Gilbert on Rents; Gale and Whatley on Easements; Angell on Watercourses; Angell on Tide Waters; Woolrych on Window Lights; Amos on Fixtures.

portion of real property. No less than eleven different kinds are enumerated by Blackstone, namely;—*Advowsons, tithes, offices, dignities, franchises, corodies, pensions, annuities, commons, ways and rents*. But this list is very much reduced in this country. For in regard to the first two, namely *advowsons* and *tithes*, it is sufficient to say that they grow exclusively out of the *English church establishment*, which happily has no existence in this country; and we are thus relieved from a great variety of perplexing questions. In regard to the next six, namely, *offices, dignities, franchises, corodies, pensions, and annuities*, they have, in the first place, no necessary connection with realty; and in this country, they are not, and cannot be hereditary. On the contrary, they are strictly personal in their character; and with the exception perhaps of *annuities*, in some cases, are neither transferable nor descendible. Not only some express provisions of the federal and state constitutions, but the whole spirit and tendency of our institutions, are opposed to the English doctrines and practice in regard to these hereditaments, if such they can be called in this country. For these reasons, I shall not stop to describe them. Again, as to the English right of *common*, which is the right that one man has, to feed his cattle, dig turf, cut wood, or take fish, on the lands of another; it originated under the *manorial establishments* of England, where the lord of the manor was in the habit of setting apart certain portions, to be used in common by tenants or copyholders. It there forms quite a diffusive and intricate branch of law. It has also prevailed in some of the older states of this Union. But in the sense of the English law, this right of common is not known here, and will not therefore be discussed. Again, *rent* is defined to be, “a certain profit issuing yearly out of lands and tenements corporeal.” According to this definition, rent may properly be classed with incorporeal hereditaments. But we commonly understand by rent, nothing more than a *periodical compensation*, in money or other property, for the use of land; and in this sense it can in no respect be considered as an incorporeal hereditament. I shall accordingly reserve the consideration of rent to its proper place in connection with estates for years.

§ 126. *Public easements*. But there are certain other rights of considerable importance connected with land, which I shall now discuss under the head of *easements*; a convenient term, sanctioned by the best usage, and sufficiently broad to include all incorporeal hereditaments known in this state. By *easements*, are meant rights or privileges relating to the land of other persons. They are divided into two classes, *public* and *private*. *Public easements* comprehend all such as are open and free to the enjoyment of every citizen. They apply chiefly to *commons, roads, and rivers*.

Public commons. (a) By our statute, whenever the proprietor of land wishes to lay out a *town* or an *addition* thereto, he is required to have a *plat* thereof surveyed, acknowledged and recorded, specifying the *streets, alleys, and commons*. And the effect of complying with these requisitions, is to vest in the *town*, for the use of the public, the fee-simple of all such portions as are designated to be for public use. Here then, while the land, on which the streets, alleys, and commons are laid out, belongs to the town, the easement belongs to the public at large. But apart from this statutory provision, it is not necessary that the fee in the land should pass, in order to secure the easement to the public; or that the dedication should be made in any particular form; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by this appropriation. Thus where an individual lays out a public street over his land, or where the proprietor of a town reserves a spring or common for the public use, the easement vests at once in the public, without regard to length of possession; and the owner cannot revoke the dedication.

Public roads. By these I mean roads laid out by the public authorities. The mode of proceeding to lay out state, county, and township roads, is detailed at length in the statutes, with the particular provisions of which I shall not tax your memory. The government has authority under the constitution, as we have seen, to appropriate the land of individuals for these purposes, on making them a compensation. But the public acquire thereby, only an easement in the land so appropriated. The fee simple, subject to the easement, still remains in the former proprietor. And where land is granted bounding upon a road, the grant extends to the middle of the road, unless the contrary be expressed. The difference then between streets laid out by individuals, and roads laid out by government is, that in the former the fee is in the town, and in the latter the fee is in individuals; while in both the easement belongs to the public. In either case, if the road becomes impassable, the public have a right to pass over the adjoining land without becoming trespassers, provided they do no unnecessary injury.

Public rivers. (b) The general doctrine of the common law is, that the owners of land bounded by the sea, or by navigable

(a) See *Lade v. Shepherd*, 2 Strange, 1004; *M'Connell v. Lexington*, 12 Wheat. 582; *Cincinnati v. White*, 6 Peters, 431; *Brown v. Manning*, 6 Ohio, 298; *Town of Lebanon v. Warren County*, 9 Ohio, 80; *Le Clerc v. Gallipolis*, 7 Ohio, p. 1, 217; *Cincinnati v. Hamilton County*, 7 Ohio, p. 1, 88; *Gowan v. Philadelphia Exchange*, 6 Law Reporter, 103.

(b) *Angell on Water Courses*; *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Gavit v. Chambers*, 3 Ohio, 495; *Hopkins v. Kent*, 9 Ohio, 13; *Hogg v. Zanesville*, 5 Ohio, 410; *Hutchinson v. Thompson*, 9 Ohio, 52; *Carson v. Blazer*, 2 Bin. 475; *Shrunk v. Schuykill*, 14 Serg & R. 71; *Blanchard's Lessee v. Porter*, 11 Ohio, 138.

rivers, where the tide ebbs and flows, own only to ordinary high water mark; while the shore below belongs to the public. But on navigable rivers, *above tide water*, the adjacent owners own to the middle of the stream, subject to the public easement of navigation. Of this latter class, are all the navigable rivers within this state; there being no tide within its limits. By the fourth article of compact in the ordinance of 1787, "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them," were declared to be "public highways, and for ever free to all citizens;" and by the ninth section of the act of Congress of 1796, "all navigable rivers within the North Western Territory," were declared to be and remain "*public highways*;" and where the opposite banks of any stream, *not navigable*, belonged to different persons, "the stream and the bed thereof," were declared to be *common to both*. In regard to this provision, our court has decided, that in the case of navigable rivers, the easement only is reserved to the public, while the fee of the bed of the river belongs to the adjacent owners; and that this act only affirms the common law, in relation both to navigable and unnavigable streams; namely, that opposite owners should own to the middle of the stream, as in case of roads, they own to the middle of the road. It will be observed that the words of the provision are "the stream and the bed thereof shall be common to both." A literal interpretation of these words, would make the opposite owners *tenants in common* of the bed of the stream, instead of each being a tenant in severalty to the middle, as the court intended above. Perhaps this distinction may be of importance hereafter. Our court has also decided that the legislature has no authority to obstruct a public easement in navigable rivers; and that where a dam was permitted to be laid across, by reason of which navigators sustained damage, the owners of the dam were liable, although they were authorized by law to build the dam, and used all diligence to prevent it from being an obstruction. But the state may legislate respecting these rivers, and even affect their navigation, provided all persons are equally subjected to the inconvenience resulting from such navigation, and provided the navigation, though affected, be not actually destroyed. It may become a difficult question hereafter, to determine what are navigable rivers within this act. The second section of the act of Congress of 1796, provides that navigable rivers shall not be included in *public surveys*; but does not indicate what shall be considered such; and it is left to the discretion of the *surveyor* to include a given river or not. But of course his decision cannot be conclusive. In the deed of cession by Virginia, the description specified "all the territory to the northwest of the river Ohio." And from these words it has been decided, that the owners on this side have no right of soil, farther than to the edge of the river at low water

mark. But as a matter of expediency, amounting almost to necessity, the states bordering on this river have habitually exercised a common jurisdiction. The question whether the right of fishing in these navigable rivers, is a public right open to all, or a private right belonging to the adjacent owners, has not been judicially decided in this state. In practice it has been treated as a public and common right. And in Pennsylvania such has been the decision with respect to the rivers of that state.

§ 127. *Private easements.* Private easements comprehend all those which belong to particular individuals. They relate chiefly to the use of *land, water, air, and light.*

As to land. (a) The most important easement under this head, is the right of *private way* over another man's ground. This right may arise in three ways; from *contract*, as where I expressly grant this right to you; from *prescription*, as where you have enjoyed the right unmolested for a certain period, which under our statute of limitations, would probably be twenty-one years; or from *necessity*, as where I sell you land so hemmed in by mine, that you cannot come at it without crossing mine. This right of way is always confined to one particular track, which the owner of the right is bound to keep in repair; and if he suffers it to become impassable, he cannot, as in case of public highways, pass over the adjoining land. There are several other easements under this head, which are denominated *urban*, from being confined chiefly to cities and populous towns. Such are the right of *support*, as where I have a right to rest my timbers on the wall of your house; the right of *drip*, as where I have a right to let the water fall from my roof upon your premises; and the right of *drain*, as where I have a right to convey water through your premises. These rights may arise either from *contract* or *prescription*, but I presume not from *necessity*. When a *party wall* stands equally on the land of each adjacent owner, and has been erected at joint expense, each owner, thereby acquires a right to the use of such wall, and is bound to contribute towards all necessary repairs: and the same is true, where the wall stands wholly on the land of one, provided the other has acquired, either by contract or prescription, a right to use it as a party wall. But without special provision, which is made in many cities, neither party can be compelled to contribute to the original erection of a party wall, or to furnish a portion of his land for that purpose. At common law the same rules govern *partition fences*, but in most of the states these are the subject of statute regulation. In Ohio, for example, a partition fence between two inclosures, without any agreement, is at

(a) See 2 Black. 35; 3 Kent 434; Campbell v. Meier, 4 Johns. Ch. Rep. 334; Lasala v. Holbrook, 4 Paige, 169; Rust v. Law, 6 Mass. 90; Stackpole v. Healy, 16 Mass. 33.

the joint expense of both proprietors. But if one owner does not choose to inclose his land, he is not bound to contribute. As to the *foundations* of buildings in compact towns, in the absence of special provision, the rule is, that each man may pull down his, or lay new ones, on giving notice and using ordinary care, without liability for injury to those next to him.

As to water. (a) Of the use of water in general, it must be observed, that water, like light and air, was undoubtedly intended to be the property of all mankind; and therefore, while the *use of running water* may belong to a particular individual, the thing itself can never be exclusively appropriated. An easement is all the property that can be had in it. If, either from owning the soil covered by water, or from contract, or prescription, I am entitled to use a certain body of water, either for turning a mill, or for fishing, or for any other purpose, the law protects me in the enjoyment of that right, but at the same time forbids the appropriation of that water to myself, any further than is necessary for that particular use. We have seen that the navigable waters of this state are common highways; but that the adjacent owner owns to the middle of the stream. It follows that he may have a private easement in the water, not inconsistent with the public easement. For example, he has the exclusive right of drawing nets upon his own bank. So he may take the water to turn a mill or perform any other service which does not interfere with navigation. As to waters not navigable, we have seen the only difference to be, that the public has no easement therein. Accordingly, no individual can have a right even to fish in the stream, except the adjacent owner, unless by contract or prescription. The exclusive use of the water belongs to the adjacent owner, subject to the great leading principle of not interfering with the rights of owners above and below. As to grants of lands adjoining rivers, the principle is, as in case of roads, that they extend to the middle, unless the words of the grant exclude such an inference. The implication is always in favor of the extension. But when the words of the grant expressly limit it to the edge of the stream, low water mark is the boundary line; and the adjacent owner would have no right to use the water beyond that line. (b)

As to light and air. (c) In these elements, as in water, there can be no absolute property; but the owner of land may acquire a right to use them in a certain way, so that his neighbor can do nothing to obstruct him in that use. For example, if, for the period of prescription, I have had the light admitted into my house in a certain direction, and have enjoyed a pure atmosphere,

(a) See 2 Black, 14; 3 Kent, 439; Angell on Water Courses.

(b) *M'Culloch v. Aten*, 2 Ohio, 307; *Hopkins v. Kent*, 9 Ohio, 13; *Benner v. Platter*, 6 Ohio, 504.

(c) See 2 Black, 14; 3 Kent, 358.

I have acquired such a right, that my neighbor can do nothing on his land, either to obstruct the light or taint the atmosphere, without being guilty of a *nuisance*; at least the rule is so laid down in the books. But it must be taken with so many qualifications, particularly in cities, and the application of it is of so rare occurrence, that a bare allusion to it is as much as I have room for.

§ 128. *Fixtures.* (a) From the view heretofore given of what constitutes realty, it is obvious that there may be certain articles of property which occupy so nearly a middle place between realty and personalty, that it is difficult to say at once to which class they belong. This is the case with what are called *fixtures*, including those chattels, which by being *annexed* as appendages to the realty, become parcel thereof. The annexation may be either *actual* or *constructive*. Thus locks, doors, windows, blinds, wainscots, and the like, are actually annexed; while title-deeds, keys, and the like, are constructively annexed. It is of little consequence what are fixtures and what are not, until there is a change of possession, but then it will be a question of great importance: and this will happen in the three following cases. 1. When the owner dies. In this case it is not important to his *creditors*, because if the personalty will not satisfy their claims, they can resort to the realty. But between the *widow* and *heirs* it is important; because if there be no children, the widow has the whole of the personalty; otherwise, half of the first four hundred dollars, and a third of the residue; and this she has absolutely; whereas, she can in no case have more than a life estate, in one third of the realty. 2. When the owner sells. In this case the privileges and appurtenances, in which fixtures are included, pass with the land; and it is of course material, as between the vendor and vendee, what are to be considered fixtures. 3. When the owner leases. In this case the question is more important than in either of the preceding; for the lessee often finds it necessary for his business or comfort, to make various additions and improvements, during the continuance of the lease; and it is therefore of the utmost consequence for him to understand, whether, at the expiration of his lease, these are to belong to his landlord or himself. Now in all these cases the ancient rule was, that all chattels, when once fixed to the realty, became parcel thereof, and pass or remain therewith; but in modern times this rule has been very much relaxed, for the benefit of trade and agriculture, in favor of lessees; while in regard to the other persons above named, it remains very nearly as at first. Thus a lessee has been allowed to take away kettles fixed in mortar, steam engines, mills, and even buildings which he had constructed during his lease. On the whole, the rule as it now

(a) See Amos on Fixtures; 2 Chitty's Blackstone, 282, note; 2 Kent, 341; 1 Swift's Dig. 74; 10 American Jurist, 53; Elwes v. Maw, 3 East, 38; Whiting v. Brastow, 4 Pick. 310; Van Ness v. Pacard, 2 Peters, 137.

stands, seems to be, that if the articles in question are annexed for the special purpose of immediate profit, and make no necessary or customary appendage to the realty, and if they can be severed without injury to the value of that which remains, they belong to the lessee; otherwise to the owner. It is hardly necessary to add that these remarks apply only to cases where the parties have made no special provision concerning the fixtures. They can make what contract they please, and the law will enforce it; but when they are silent, the law gives the construction I have mentioned.

I have before named the American law of incorporeal hereditaments, as one of the instances of improvement in the law of realty. If the student will now take the trouble to read Blackstone or Cruise on the same subject, he will feel the truth of the remark: and he will see that the chief difference is to be traced to two causes; our entire disunion of church and state permitting nothing like a religious establishment; and our total abolition of hereditary personal distinctions. In a word, he will find in this very comparison, one of the best illustrations of the proposition, that the essential genius of republicanism is simplicity.

LECTURE XXI.

ESTATES WITH RESPECT TO DURATION. (a)

§ 129. *Nature of estates.* The inquiry next in order, relates to the various kinds of *estates*. The term, *estate*, when applied to realty, signifies the *interest* which the owner has therein: so that if I grant *all my estate* in a certain parcel of land, all my interest thereby passes, without any other words. In common language, the term is used in a broader sense. Thus, when we speak of the estate of a certain person, we mean by it, all he is worth, whether of personalty or realty. But at present we are concerned with estates in their technical acceptation: and here they divide themselves into various classes, depending *first*, upon their duration; *secondly*, upon their commencement; *thirdly*, upon the number of owners; and *fourthly*, upon the conditions which may be annexed to them. In this lecture, I shall consider estates only with reference to their duration; and in this view they divide themselves into five classes; namely, estates in fee,

(a) See 4 Kent, lec. 54, 55, 56; 2 Black. ch. 7, 8, 9; 1 Swift, b. 2, ch. 2, 3, 4, 5, 6, 7.

for life, for years, at will, and at sufferance. It has been customary to make a more general division of estates into two classes; namely, *freehold estates*, and *estates less than freehold*; and then estates in fee and for life are included in the first class, being the only estates of freehold dignity. For by the common law, an estate for the longest fixed term of years, though it might exceed a hundred lives, is accounted no more than a *chattel interest*; while an estate for life, however short that life may be, is a *freehold interest*. This doctrine originated in feudal reasons, which have long since ceased to exist. As a feud, when once created, could not be terminated by the mere will of the lord, whatever could be held as a feud, was called a *frank tenement* or *freehold*. Now feuds could not be conferred for a term of years, but were either for life or hereditary; and hence freeholds included only estates in fee, and for life. Again, feuds were always conferred by *corporeal investiture*; and hence by the common law, freeholds could not be created without *livery of seisin*. This term, *seisin, seisinæ*, originally signified actual possession of land under a feudal grant. But when feuds became hereditary, and the heir succeeded by law to the rights of the ancestor, a distinction was made between *seisin in fact*, which was the actual possession before mentioned, and *seisin in law*, which was the right of possession acquired by the heir before *entry*, but not perfected into actual possession until entry. A similar distinction is said to prevail now, where the ceremony of *livery of seisin* is still in use, which signifies that formal delivery of possession required to perfect the conveyance of a freehold. The parties, grantor and grantee, with their witnesses, go to or upon the land, and the grantor actually delivers to the grantee a key, twig, or some other thing, as a symbol of the delivery of the land. But the case was entirely different with estates for years; not being created with feudal solemnities, they were held by the most precarious tenure; it depended upon the will of the feudal owner to terminate the tenancy when he pleased; and though he should violate an express agreement, the tenant had no remedy for the recovery of possession. An estate for years, therefore, when held by so frail and slavish a tenure, could with no propriety be called a *freehold*. And such continued to be the law until the year 1530, when it was altered by act of Parliament; and the tenant for years was made as secure in his possession as a tenant for life. From that time, the real difference between freehold and other estates ceased; but the technical difference in the mode of creating them continues to this day in England, and perhaps in many of the states; and from this difference resulted another, namely, that freeholds could not be made to commence *at a future time*, while other estates could. The reason was, that *livery of seisin*, being in its nature a present act, could not have a future operation; whereas, estates for years, requiring no *livery of seisin*, might commence at any

time the parties should agree. In this state, however, these technical differences have also ceased; for here, *livery of seisin*, as will appear in the sequel, is never necessary in the creation of any estate. The distinction, then, between freehold and other estates, is of no further use to us, than as it serves to determine, who are entitled to exercise certain civil functions, which by our law are confined to *freeholders*. And I shall accordingly consider estates, with reference to their duration, as divided into the five classes before named.

§ 130. *Estates in fee.* (a) An estate in fee, is one, which, at the death of its owner, if not otherwise disposed of by him, *descends* to his heirs. In feudal times, as we have seen, the term *fee* had a different signification; but it now means nothing more than a *descendible estate*; so that an estate in fee, is the same thing as an estate of inheritance. Of the various ways in which this estate may be created, I shall speak hereafter. It is sufficient now to say, that where it is created *by deed*, the word *heirs* is indispensable, unless otherwise provided by statute; which is not the case here. This is an inflexible rule of the common law, and no words of *perpetuity*, will supply the place of the word *heirs*, except in the grant to corporations, where the word *successors*, though not essential, is usually substituted. Accordingly, if in creating this estate by deed the word *heirs* happen to be omitted, however clear may be the intention to create a fee, the grantee will take only a life estate. But in regard to *wills*, this severity is relaxed, on account of the hurry and want of advice with which they are often made; and there, any words of perpetuity, signifying an intention to create a fee, will have that effect. Several of the states, have, by express provision, put deeds upon the same footing as wills, in this respect; and I cannot help looking upon the common law rule as arbitrary and unjust. It is certainly in direct opposition to one of the prevailing rules of interpreting contracts, which is, to construe them most strongly against the maker or grantor, and most beneficially for the other party. But its origin is to be traced to the feudal system. At first, as we have seen, feuds were not hereditary. At length, they began to be conferred on feudatories and their heirs. At this stage of the law, if the word *heirs* were omitted, the presumption was that the lord only intended to create an original feud, not hereditary; and this presumption, which was then reasonable, has ever since prevailed in courts of law. In courts of equity, however, when a contract for conveyance is to be construed, this rigid rule is departed from; and the omission of the word *heirs* is supplied, whenever this appears to have been the intention of the parties.

What has now been said, applies to all estates in fee. But it is usual to divide these estates into two classes, *fees simple* and

fees conditional. Since, however, conditions may be annexed to every other species of estate, as well as an estate in fee, I have thought it better to consider conditional fees, in connection with other conditional estates, in a separate division. At present, therefore, I am only concerned with *estates in fee simple*. This is the highest possible interest, which a man can have in real property, whether corporeal or incorporeal. It includes all interests present and future. It forms a unit or whole, of which all other estates are but fractions or parts. It comes to the owner with the unlimited power of alienation during life; and unless he does something to incumber it, passes in the same absolute character to his heirs. Such estates are obviously more in harmony with the free spirit of our institutions, than those which are clogged with conditions and limitations. It does not suit the genius of our citizens, to be put under restrictions with regard to the disposition of property. They prefer to be the absolute masters of what they call their own. Hence those "fettered inheritances," which are so common in England, are rare in this country. The prevailing estate is a fee simple. And this is one leading cause of the exceeding simplicity of our land system.

§ 131. *Estates for life.* (a) Estates for life rank next in importance to estates in fee. We have seen, that for feudal reasons, they are esteemed of higher dignity than the longest estate for years. An estate for life is so much taken off from a complete estate in fee. The future estate in fee expectant on the termination of the life estate, is called either a *reversion* or *remainder*, as will be explained hereafter; and the two together constitute one complete estate in fee. An estate for life may either be for the life of him who has it, or for the life of a third person. In the first case, the owner is called *tenant for life*, simply; in the second, *tenant for another's life*, or in law French, *tenant pur autre vie*; while he for whose life the estate is held, is called *cestui que vie*. Both these estates are of freehold dignity, though the former is justly regarded as the preferable estate, because it certainly must last as long as the owner lives, while the latter may not. But connected with an estate for another's life, is one curious question. Suppose the owner dies before the man for whose life it is held; to whom does the residue of this estate belong? It does not revert to the grantor, for the time has not expired; and it does not descend to the heirs of the grantee, unless they are expressly mentioned. This was the reasoning of the ancient common law; and to solve the difficulty, any person was permitted to take possession by way of *special occupancy*, as of a vacant estate, and hold it till the death of him by whose life the estate was measured. In England, and in many of the states,

(a) 2 Black, chap. 8; 4 Kent, lec. 55; 1 Cruise's Dig. 59.

this doctrine has been altered by statute. In this state we have no provision on the subject; but yet I would venture to say that our courts would never recognize so absurd a doctrine, as to allow a stranger to take possession. Undoubtedly the residue of the estate, would go to the representatives of the deceased owner, according to our rules of distribution. And whether we call this residue a *freehold* or a *chattel interest*, is of little consequence; for in either case, the heirs will have it, if there be no debts to pay. But from the phraseology of our statute of descent, which confines its operation to real estates of inheritance, of which the above is certainly not one, I presume that this remaining interest would be distributed as personal property. Estates for life may be created either by the *act of the parties*, or by the *operation of law*. Thus if I grant land to you for the term of your life, I create in you an estate for life by express words. If I grant land to you without any specification of time, I create in you an estate for life, by legal construction. For it cannot be a fee, because it has not the word *heirs*; and it cannot be an estate for years, because the years are not specified. It is therefore construed as a life estate. There are but two estates for life by the operation of law, namely, *dower* and *curtesy*; both resulting from marriage, and both having the same general incidents as other life estates. Of these general incidents only, I shall now speak; reserving what is peculiar to these two estates, for a more appropriate place, in connection with the mode of acquiring title.

Termination. (a) An estate for life, in this country, terminates only with the *natural death* of the person. We know no such thing as *civil death* under the English law. Monastic seclusion does not exist among us; bills of attainder are prohibited by the federal constitution; and no crime creates a forfeiture of estate; for our constitution declares "that no conviction shall work corruption of blood, or forfeiture of estate." And I presume the same principle exists in all the states.

Estovers. (b) A tenant for life has a right to take reasonable *estovers*; that is, *wood* and *timber* necessary for the purpose of *building, burning, ploughing, and fencing*; but he has no right to cut down timber for any other purpose, as to sell it. The general principle is, that he is entitled to nothing more than what is necessary for the temporary enjoyment of the estate. The law prevents him from impairing the value of the inheritance, as we shall see more particularly under the head of *waste*. On the subject of estovers, we have no statutory provision.

Emblements. (c) On the death of a tenant for life his representatives are entitled to the *emblements* not yet severed from the land; that is, to those *annual crops* which were the immediate fruits of his labor; such as *grain, garden-roots, and the like*.

Grass and fruits are not emblements, because they do not owe their existence to the annual cultivation of man. The doctrine of emblements is, that the tenant who could not foresee his death, planted in expectation of reaping; and it would be hard if those things which he planted that year, should go to the next owner of the estate. But where the tenant knows when the estate is to expire, the emblements go to the next in estate. In this state, (a) emblements, though not yet severed from the land, are regarded in all respects as personalty. As such they must be included in the inventory made by an executor or administrator, and as such they are levied upon and sold on execution. As a general rule, no person, having a right to emblements, becomes a trespasser by entering upon the land to take them away.

Alienation. (b) A tenant for life, unless the contrary be stipulated, has the power of disposing of his entire estate, or any less portion. And if he undertakes to create an estate in fee, this does not work a forfeiture. The common law doctrine of forfeiture, by attempting to grant a greater estate than one has, never existed in this state, and probably not in this country. Forfeiture took place only under the common law conveyances, which, as we shall see under the proper head, were never adopted here. If therefore a tenant for life undertakes to convey a greater estate than he has, the conveyance will be good for so much as he has.

Incumbrances. (c) If a tenant for life, takes an estate charged with an incumbrance, he is not required to pay off the incumbrance; but only to keep down the interest, leaving the principal to be paid by the owner of the fee. If this were not the rule, the life estate might be of no value, but even run the tenant in debt. Equity therefore has established this rule.

Waste. (d) A tenant for life is liable for *waste*. In general terms, waste may be defined to be, a spoiling or destroying of the estate with respect to *houses, wood, or soil*, to the lasting injury of the inheritance. But no damage resulting from the act of God, as lightning or tempest; or from public enemies, as an invading army; or from the reversioner himself, is waste. There are two kinds of waste, *voluntary* and *permissive*. Voluntary waste is that which results from *actual commission*, as felling timber, defacing buildings, opening mines, and changing the course of husbandry. Permissive waste is that which results from *omission*, as suffering buildings or other improvements to go to decay. But in every provision against waste, *estovers* are of course ex-

(a) Where mortgaged lands are sold under a decree of foreclosure, the emblements of a lessee are protected, and do not pass to the purchaser. *Cassily v. Rhodes*, 12 Ohio, 564.

(b) See 4 Kent, 82; 2 Black. 265.

(c) See 4 Kent, 74; *Decker v. Decker*, 3 Ohio, 165.

(d) See 2 Black. 281; 4 Kent, 75; *Loomis v. Wilbur*, 5 Mason, 13; *Jackson v. Brownson*, 7 Johns. 227.

cepted. And it has been held that where timber has been cut down and sold, to purchase boards for making repairs, this is not waste. The circumstances of this country have also made one change in the law, respecting waste; which is, that in case of *wild lands*, the tenant may clear a reasonable portion, for the purpose of cultivation, without being guilty of waste. With respect to *repairs*, in the absence of any special agreement between the tenant and the next in estate, the rule is, that the tenant shall keep the premises in as good condition as he found them, inevitable accidents only excepted. And where there is a special agreement to repair, the tenant is not excused even by inevitable accident, unless he so stipulates. The obligation of the tenant to preserve the premises from waste extends also to the acts of strangers, for which he is liable, having his remedy against them. In some of the states, waste is guarded against by the statutory penalty of forfeiture of the place wasted and treble damages. In Ohio, the only case of forfeiture for waste is that of a dower estate. But, as will be seen hereafter, in all cases of waste, a court of equity will prevent it by injunction, or if it be already committed, the party injured may recover damages in an action at law.

§ 132. *Estates for years.* (a) An estate for years has been defined to be, a contract for the possession and profits of land, for a *certain* period. Its distinguishing characteristic is, that it must expire at a fixed period or *terminus*, which is always ascertained at the creation of the estate; hence the estate itself is called a *term*, and the tenant a *termor*. This estate is never created by the operation of law, but always by the act of the parties. The instrument creating it is called a *lease*, and the parties *lessor* and *lessee*, or *landlord* and *tenant*. These latter terms are derived from the feudal system, though the relation itself did not exist under that system, all feuds being freehold. An estate for years originally differed from a freehold in the five following particulars. 1. Livery of seisin, as we have seen, was not necessary in creating it. Hence the tenant could not be said to be *seised*, but merely *possessed* of the land. He had no interest in the *soil itself*, but merely in the profits of the soil. His estate was therefore treated as a *chattel*; and this technical distinction still continues, though the reason has ceased, livery of seisin not being now necessary in the creation of any estate. 2. An estate for years might be made to commence at a future time, while a freehold could not. But this distinction, as we have seen, no longer exists. 3. An estate for years was originally held, as we have seen, by a precarious tenure: but now the law makes this tenant as secure in his possession as the tenant of a freehold. 4. An actual *entry* by the tenant was necessary to perfect this estate. But now an

(a) See 2 Black. chap. 9; 4 Kent, lec. 56; 1 Cruise's Dig. 243.

actual entry is not required in any case. The execution and delivery of the lease, perfects the title of the lessee to all intents and purposes. 5. It made no difference, as to the nature of this estate, whether it were for only a part of a year, or for any number of years. It might be for a month, or for a thousand years; but it was still no more or less than an estate for years, with precisely the same legal incidents. In fact, by a very common practice, this estate could be so created as to last for ever, without altering its character. This is the case with what are called *perpetual leases*, in which a certain term is created, *renewable for ever*. Yet at common law these estates, although they may continue for ever, are nothing more than estates for years. The fee still remains in the lessor, and the lessee has only a chattel interest. But by our statute, these permanent leasehold estates are made subject to the same law of descent and distribution, and of sale on execution or by decree, as estates in fee. Though as to dower and curtesy, and in all other respects but those above mentioned, they still continue to be chattel interests.^(a) The incidents of estates for years are nearly the same as those of estates for life, except in regard to *emblements*. Thus tenants for years, in the absence of a special agreement to the contrary, have the same right to *estovers*, the same power of *underletting*, are in the same manner exempt from *forfeiture*, for creating a greater estate, and are equally liable for *waste*. The reason why they are not entitled to *emblements* is, that the termination of their estate is fixed and certain; and it is their own folly to sow what they know cannot come to maturity during their term.

Rent. But there is one additional incident, belonging sometimes to estates for life, and generally to estates for years, which remains to be described. I mean *rent*. According to Blackstone, rent is "a certain profit issuing yearly out of lands and tenements corporeal;" and there are three kinds of rent, namely, *rent-service*, where the fee remains in the landlord, and the tenant is bound to render some corporeal service in partial or full return for the use of land, which service may be enforced by *distress*; *rent-charge*, where the fee is granted with a reservation of rent, and with a special clause of distress, charging the rent upon the land; and *rent-seck*, where the fee is granted with a reservation of rent, and without a clause of distress. The term *distress*, here signifies a summary mode allowed to the landlord, of seizing and selling the tenant's property to satisfy the rent which he owes. But in this and several other states, the power of enforcing payment by distress is confined to the collection of public dues; and the landlord stands on the same footing as any other creditor.

(a) But see *Loring v. Melendy*, 11 Ohio, 355, where the court declare that "permanent leasehold estates are lands, subject to all the rules and laws which attach to lands for all purposes." Also *McLean v. Rockey*, 1 West. Law Jour. 300.

Accordingly, the foregoing distinctions are of little importance; and we may consider rent simply as a periodical compensation, in money or otherwise, agreed to be given by the tenant to the landlord for the use of realty, the payment of which may be enforced like any other demand. I say agreed to be given, because where one occupies another's land without a lease containing a special agreement to pay a fixed rent, the compensation which may be recovered, is not in the shape of rent, but of damages in an action for *use and occupation*, or for *mesne profits*, as will be explained hereafter. When the relation of landlord and tenant has been created, the estate of the landlord is denominated a *reversion*, to which rent is said to be incident. If therefore he conveys the reversion, the future rent passes with it, and when he dies it goes to his heirs; but it is otherwise if the rent be already due. If the tenant be evicted by a paramount title in a stranger, or actually expelled by the landlord, his obligation to pay rent ceases; but no destruction of the premises by fire, flood, or other inevitable accident will discharge the obligation, unless the lease contains a provision to that effect. Where the lease provides for a forfeiture in case of non-payment of the rent when due, a tender or readiness to pay on the premises at any time, before sunset on the day stipulated, will be sufficient. (a) The tenant is not obliged to seek the landlord away from the premises unless he agrees so to do, but he may make such tender, and it will be good. When leased property becomes divided, either by the act of the landlord or by operation of law, if the parties cannot agree upon an apportionment of rent, it must be made by a jury.

§ 133. *Estates at will.* (b) An estate at will was originally where the tenant occupied at the mere pleasure of him who had the next estate; and who could terminate the tenancy at any moment without previous notice. Such a connexion between landlord and tenant harmonized perfectly with the arbitrary notions of a landed aristocracy. It had but one redeeming quality, and that was with regard to *emblements*. The tenant at will, having no knowledge when he might be obliged to quit the premises, was entitled to emblements, on the same ground as the representatives of a tenant for life. But as notions of liberty began to gain ground, the slavish character of this tenancy became gradually changed. It was first settled that an estate at will *was equally at the will of both parties*; and that neither could terminate the tenancy without fair notice to the other. The next improvement was to determine, that, unless there was an express agreement to hold at will, all tenancies for no stipulated term, should be construed as *periodical tenancies from year*

(a) *Conor v. Bradley*, 1 Howard, 211.

(b) See 2 Black. chap. 9; 4 Kent, lec. 56; 1 Cruise's Dig. 269; *Moore v. Beasley*, 3 Ohio, 294; *Coffin v. Lunt*, 2 Pick. 70, and note to that case; *Spencer v. Marckel*, 2 Ohio, 265.

to year, or some shorter period, according to the facts of the case. The establishment of this wholesome doctrine is a virtual abolition of estates at will; and it has been fully recognized in this state. But since the creation of this periodical tenancy, there has been much diversity of opinion in different places, in regard to the *notice to quit*. In England, it is half a year; in some of the states the same; in others, a reasonable time; but here nothing is settled. We have two ways of dispossessing a refractory tenant; namely, by the action of *ejectment*, and of *forcible detainer*. In *ejectment*, our statute requires ten days' notice before the commencement of the term to which the appearance is to be made; and in *forcible detainer*, three days' notice before the commencement of the suit; but this is a different thing from notice to quit. Whatever this be, it must be so given as to expire before or at the time the period expires; for if the tenant has been allowed to enter upon a new period without notice, he cannot be dispossessed until the end of this period. And the chief criterion to determine whether a tenancy is from year to year, from quarter to quarter, or from month to month, is the pay-day or rent. On account of the uncertainty whether his term will be renewed, a tenant from term to term is entitled to *emblements*, as much as if he was strictly a tenant at will. In this respect, and in the right to notice to quit, he differs from a tenant for years. In other respects his powers, privileges, and liabilities are nearly the same.

§ 134. *Estates at sufferance.* (a) An estate at *sufferance* is where one comes rightfully into possession of land, but holds over after his interest is determined. A tenant at sufferance differs from a mere *intruder*, in this, that he is not a trespasser. But he has no interest capable of being transferred or defended; and it is said that independently of statutory provision, he is not liable to pay rent. We have no statute on the subject; but the doctrine is so absurd on the face of it, that I presume our courts would not recognize it. The tenant could not indeed be sued for *rent* technically speaking, under the lease, because it has expired; but I have no doubt he might be liable in an action *for use and occupation*. At common law, this tenant is not entitled to notice to quit. But here, this point is of very little importance; because, as we have seen, there must be ten or three days' notice, as the case may be, before he can be dispossessed *by action*. The landlord may indeed *enter* at any time, without notice, and will not thereby become a trespasser; and if he can turn the tenant out *peaceably*, he will thus acquire possession immediately. But if the tenant refuses to go out, he cannot use force upon his person; for though we have no statute making *forcible entry* an indictable offence, yet in the case supposed, the landlord could not justify an assault and battery. Unless,

(a) 2 Black. chap. 9; 4 Kent, lec. 56; 1 Cruise's Dig. 269.

therefore, he can expel the tenant at sufferance peaceably, he must give the required notice, and then bring his action. This tenant therefore has an undue advantage over his landlord. In England and in many of the states, a penalty of *double rent* is imposed by statute, for holding over; while here, there is not only no penalty, but in our course of proceeding, an obstinate tenant cannot be expelled under perhaps several months. This is an evil which calls loudly for remedy.

It will be seen, that the foregoing observations have related to realty only. In fact no such distinctions prevail with respect to personalty, on account of its transitory nature. There may indeed be a qualified ownership; that is, a man may have possession of an article of personalty, and a right to use it for an indefinite or definite period, without being the absolute owner of it. But there can be no such distinction as a fee simple, or freehold, with respect to it. Technically speaking, personalty is not hereditary. On the death of the owner, it passes according to the law of *distribution*, to the personal representatives, but does not *descend* to the heirs like the fee of land. But all this will be explained hereafter. It is sufficient here to remember that the distinction of estates with respect to duration belongs exclusively to realty.

LECTURE XXII.

ESTATES IN REVERSION AND REMAINDER. (a)

§ 135. *Estates in reversion.* (b) Estates are divided, with respect to their commencement, into estates in *possession*, in *reversion*, and in *remainder*. Of estates in possession there is nothing to be said. All the remarks hitherto made, apply to estates in the actual possession of the owner. This is their most natural and obvious situation. But the first three of the foregoing estates, namely, estates in fee, for life, and for years, while they are in the present occupation of one person, may belong in expectancy, either in *reversion* or *remainder*, to another. To these accordingly we turn our attention. An *estate in reversion* may be defined to be, the residue of an estate remaining in the grantor or his heirs, to come to his or their possession, after the determination of some particular estate granted away. It

(a) See 2 Black. chap. 11; 4 Kent, lec. 59, 60; 1 Swift's Dig. b. 2, chap. 9; 2 Cruise's Dig. title Remainder and Reversion; Fearne on Remainders.

(b) 2 Black. 175; 4 Kent, 353; 2 Cruise, 154; 1 Hilliard's Dig. 418.

grows out of this legal maxim with regard to property, that whatever interest a man has, and does not dispose of, remains in him and his representatives. A reversion may be in fee, for life, or for years. Thus if I have an estate in fee, and grant you any smaller estate, the reversion in fee still remains in me. If I have an estate for life, and grant you any smaller estate, the reversion for life still continues in me; and if I have an estate for years, and grant you an estate for a less number of years, the reversion for years still continues in me. In this way there may be any number of reversions existing in the same estate, in the same manner as a unit may be divided into any number of parts; and all these estates in reversion, added to the estate in possession, make together only one fee simple estate in possession. An estate in reversion is considered as a *present interest*, though it can only take effect in *future*; and as such, is transferable and descendible in the same manner as an estate in possession. Formerly, the usual incidents to a reversion were *fealty* and *rent*. But fealty does not exist here; and rent is not inseparable. I may have a reversion with or without rent. If I lease you an estate for years, I have a reversion with rent. If I sell you a life estate outright, I have a reversion without rent. In like manner I may separate rent from the reversion, when originally connected; for I may grant the rent without the reversion, or the reversion without the rent. The latter however can only be done by express words. If I grant the reversion simply, the rent passes as an incident. But if I grant the rent simply, the reversion does not pass. Estates in reversion, however, being always created by operation of law, and never by positive grant, are so simple and so easily comprehended, that no further remarks are necessary.

§ 136. *Estates in remainder.* (a) An estate *in remainder* may be defined to be, an estate limited by the grantor to take effect and be enjoyed by the grantee, after another previous estate shall be terminated. For example, if I grant land to you for life, and then to your brother and his heirs, the latter estate is a remainder. The estate which precedes the remainder is called a *particular* estate. Remainders differ from reversions in this, that they are always created by the express act of the parties, while reversions result from the operation of law; and also in this, that remainders are never limited to the grantor, while reversions are always reserved to him or his heirs. In other words, a remainder is something granted; a reversion is something reserved. Estates in remainder form by far the most abstruse and intricate subject, connected with the law of realty. They had their origin in the English fondness for family settlements. It is not uncom-

(a) 2 Black. 163; 2 Cruise, 258; 4 Kent, lec. 59 and 60; 1 Hilliard's Dig. chap. 41—51, pages 362—418.

mon to find in such settlements eight or ten remainders limited one after the other, in order to prevent the possibility of the estate passing out of the family of the grantor. Fortunately, the spirit of our institutions is utterly opposed to these entangled and cumbrous arrangements; and accordingly our books contain few discussions on the subject. In this state, so far as I know, there has not been a single case; not from any legal prohibition, but from the general disposition of our citizens to keep property as little trammelled as possible. On this account, I shall attempt no more than to give a very general statement of the leading properties belonging to remainders.

To whom remainders may be limited. (a) 1. In this state we have a statutory restriction, "that no estate shall be given or granted by deed or will to any persons but such as are in being, or the immediate issue or descendants of such as are in being, at the time of making such deed or will." There is some ambiguity in these words. Had the statute said only "*immediate issue*," we should not hesitate to say that estates could only be limited to *persons in being* or *their children*. But the addition of the word "descendants," raises a doubt. It must either mean nothing at all, or it must be intended to include lineal descendants more remote than children. We have had no construction of this statute; but from the strong aversion the law manifests to *perpetuities*, and from the existence of the common law doctrine, when this act was passed, that the contingencies upon which estates were limited, must happen within a life or lives in being, and twenty-one years afterwards, I should presume that our legislature intended to restrict the limitation of estates to persons in being and their children. 2. Another restriction grows out of *the rule in Shelly's case*, (b) which may be thus stated. Whenever a person, either by deed or will, takes an estate for life, and in the same instrument, there is a remainder limited, either immediately or otherwise, to his heirs in fee, that person takes the whole estate in fee. This rule is said to have been established as early as 1325. But the case from which the rule took its name is one reported by Coke. The existence of this rule is fully recognized in this state with respect to conveyances by deed; and it was applied to conveyances by will until 1840, when the legislature abrogated it, with respect to wills, by providing that when lands are devised to any person for life, and after his death, to his heirs in fee, the devise shall be construed to create an estate for life in the devisee, with a remainder in fee simple to his heirs. In other words, the intention of the testator shall be literally carried into effect. And it is to be hoped that the legislature will

(a) 4 Kent, 264.

(b) 1 Coke's Rep. 104; 4 Kent, 214; Preston on Estates, 263; 4 Cruise's Dig. 369; M'Feely v. Moore, 5 Ohio, 464; 2 Black. 242; 2 Hilliard's Dig. 22; King v. Beck, 12 Ohio, 390.

abrogate it with respect to deeds; for though professedly a rule of construction, adopted to effectuate the intention of the parties, its obvious tendency is to frustrate such intention, by converting what was meant for a life estate into a fee simple. Besides there is scarcely a principle of our law, which has been the subject of so much controversy. But I am at present concerned with this rule only so far as it is connected with remainders. The result of its existence is, that remainders in fee cannot be limited by deed to the heirs of the same person to whom the life estate is granted; for this would be construed to be an estate in fee simple. 3. The only other restriction grows out of the distinction between remainders and reversions. An ultimate remainder cannot be limited to the grantor himself, or to his heirs general, because this would already be in them as a reversion. This follows from the definition of a reversion before given.

How remainders are created. It is a fundamental property of remainders, that they must always be created by *the same instrument or act*, which creates the particular estate; for if by one instrument I should grant a present estate to you, and by another the future estate to some one else, this last would not be the creation of a remainder, but the grant of a reversion growing out of the first grant. There have been three ways in which remainders could be created; *first*, by the ancient common law conveyances; *secondly*, by conveyances under the statute of uses; *thirdly*, by wills; and the law varied considerably according to the manner in which they were created. But in this state, as will be explained hereafter, the common law conveyances have never been in use; and although we have adopted the conveyances which grew out of the *statute of uses*, yet the statute itself is not in force here, as will also be explained hereafter. The proper division, therefore, is into remainders *created by deed*, and remainders *created by will, or executory devises*.

The leading properties of remainders created by deed, are as follows. 1. There must be a present particular estate to precede the remainder. This is implied in the very term; something must be taken out, to leave a remainder. Such is the reason usually given; and in mathematics it would be perfectly satisfactory. But the student of law, who perceives no inherent difficulty in creating a future estate, after a present estate reserved to the grantor, will require some further explanation. The necessity then, for a particular estate, only exists where the freehold is to pass in remainder; and then it results from the doctrine before referred to, that a freehold cannot be made to commence *in future*. Accordingly, when a man wishes to convey a freehold, to commence at a future time, he must first create a particular estate, to continue until he wishes the next estate to commence, and then limit the freehold thereon. In so doing, livery of seisin is made to the particular tenant, and enures to the benefit of the

remainder-man. Such is the artificial reasoning upon which the whole system of remainders is founded. But under our law, this reason for creating a particular estate, for the mere purpose of limiting remainders thereon, does not exist, because we do not make livery of seisin. I may grant an estate of freehold, to commence at any time I please; and although this would not be a remainder, it would answer precisely the same purpose. This fact certainly renders the law of remainders unnecessary here, but whether it alters that law in any respect, remains to be decided. 2. This particular estate must be at least an estate for years; for an estate at will or sufferance, having no certain measure of duration, is of too slender a nature to support a remainder; since it would depend upon the pleasure of the grantor, whether the remainder should ever take effect at all. 3. This particular estate must be less than a fee simple; for after a fee simple nothing can remain: hence it follows that the greatest estate upon which a remainder can be limited is a conditional fee. 4. This particular estate must not fail or be defeated before its natural termination; for when the particular estate fails, the remainder also fails. The one is said *to support* the other, and the maturity of the particular estate, may be likened to a condition precedent, which must be fulfilled, before the remainder can take effect. This rule seems to be entirely arbitrary, and founded in no substantial reason. The idea that one estate supports the other, is purely metaphorical; it does not have this effect from any inherent necessity, but merely because the law so ordains. The consequence is to place all the remainder-men more or less at the mercy of him who has the first estate; and to destroy the whole chain because one link happens to fail. This can only be obviated by the cumbrous arrangement of appointing *trustees* to preserve the remainders; an expedient now universally adopted in creating these estates, but which I have not room particularly to describe. 5. The remainder must vest in the grantee, either during the continuance of the particular estate, or at the instant of its termination. The reason is, that the particular estate and the remainder, being created by the same act, are considered but one entire estate, divided into parts; and if there could be an interval or hiatus between the expiration of the particular estate and the commencement of the remainder, there would be an intermediate reversion in the grantor, which would destroy the unity of his grant. This rule, like the foregoing, seems to be purely arbitrary. The reason here given would be good in mathematics, but need not be adopted in law. What harm could possibly arise from allowing the grantor to enjoy the intervening estate, until by the terms of the grant the remainder-man could take it, and then giving it to him? There is surely no necessity for breaking up the whole grant, when the deficiency could be so easily supplied; yet such is the law; and its effect can only be

obviated, as before, by the appointment of trustees to preserve the remainders. These several rules, and particularly the last, give rise to the distinction between *vested* and *contingent* remainders, which I shall now proceed to explain.

§ 137. *Vested and contingent remainders.* A *vested remainder* is where a present interest passes to a determinate person, to be enjoyed in future. Thus, if I grant an estate to you for life, with remainder to your brother and his heirs in fee, your brother acquires a present interest which he may dispose of at pleasure, though it can only be enjoyed by him and his heirs or assigns after your death. In this case, you perceive there is no doubt that the remainder will take effect at the moment your particular estate expires. In other words, the moment you die, your brother or his representatives will be ready to take, since the law will not presume an entire failure of heirs. On account of this certainty, the remainder is considered as vesting at once; and becomes as much a present interest, as a reversion is. A *contingent remainder* is where no present interest passes, on account of the uncertainty whether there will be any one to take it, when the particular estate expires. Thus if I grant an estate to you for life, with remainder to the heirs of your brother in fee; here, as it is doubtful whether your brother will die before you, and as he can have no heirs while he lives, the remainder to his heirs is contingent. If he dies before you, the remainder at once vests in his heirs, and becomes in them a disposable interest; but if he survives you, the remainder never vests at all; because the particular estate has previously terminated. In this case, the remainder is contingent, because limited to an uncertain person. It may likewise be contingent, by being limited upon an uncertain event. Thus if I give you an estate for life, with a remainder to your brother if he survives you, here the uncertainty whether your brother will survive you, makes his remainder contingent. Whenever the contingency upon which the remainder depends is changed into certainty, the remainder vests of itself in the person to whom it is limited, without any act by him; but until then, his interest being a mere possibility, is not the subject of bargain and sale. The leading rules which govern contingent remainders are as follows. 1. The event upon which a contingent remainder is limited, must not be *unlawful*. Thus a remainder limited to a bastard expected to be begotten, or to a man upon his murdering another, would be void for unlawfulness. 2. The event must be a common, and not a remote possibility. Thus, it is said that a remainder to a corporation not yet in existence, or upon the termination of a war not yet commenced, would be void from the beginning, on account of the remoteness of the contingency. 3. The event must not be such as to defeat the particular estate. Thus if I grant an estate to you for life, with remainder to another immediately, on his paying to me a given sum, this remainder

would be void in its very creation, because it would defeat the life estate. 4. If the contingent remainder be a freehold, some vested estate of freehold must precede it. The reason is, that the freehold must pass out of the grantor at the time of creating the remainder; and when it passes out of the grantor, it must vest somewhere else, since it cannot remain in *abeyance*. (a) Now it cannot pass in the contingent remainder, because that vests nowhere: it follows that it must pass in some preceding estate, which may either be the particular estate, or a preceding vested remainder. This rule is founded upon the technical doctrine, that *livery of seisin* is necessary to create a freehold. Whether the rule will be recognized in this state, where the reason has ceased, must be left to conjecture.

§ 138. *Executory devises*. (b) Remainders created by will, differ so much from remainders created by deed, that they have taken the distinct name of *executory devises*. These differences are to be ascribed to that indulgence which the law on all occasions shows to testators, by giving effect to their intentions, however untechnically expressed. A statement of them will justify what has been said respecting the arbitrary character of the law of remainders, strictly so called. 1. No particular estate is necessary to precede an executory devise, since by will a freehold might always be made to commence at a future time. Thus if I devise to you an estate in fee, to commence six months after my death, this is a good executory devise. 2. The limitation of an estate, by will, after an estate in fee simple, is said to be a good *executory devise*. For example, if I devise land to you and your heirs for ever, but if you die within age, then to your brother and his heirs; the limitation to your brother and his heirs is good by way of executory devise, although the first estate was a fee simple. (c) 3. We have seen that remainders created by deed, are defeated by the failure of the particular estate. But this is not the case with executory devises, which cannot be affected by any subsequent alteration of the estates upon which they are limited. Such is the liberal spirit of the law of executory devises in these three important particulars. For the purpose of effectuating the will of the testator, the law rises above the technical doctrines of remainders, and follows the dictates of reason. Yet it seems to do so with great reluctance; for the rule is, that no limitation by will shall be construed as an executory devise, when it can be treated as a contingent remainder. And accordingly, whenever there is a preceding estate, capable of supporting a contingent remainder, the next estate limited by devise, is construed to be a

(a) 2 Black. 107; 1 Hilliard's Dig. 408.

(b) 2 Black. 173; 6 Cruise, 461; 4 Kent, lec. 60.

(c) I take this rule and illustration as I find them in the books. But it seems to me, that after a fee simple, nothing remains; and that the example here given is one of a fee conditional.

remainder, and as such is liable to all the incidents of contingent remainders. Executory devises are expressly within the statutory provision before mentioned, restricting the limitation of estates, to persons in being and their issue; and they are within the policy of the law which requires the event upon which they are limited, to be a common and not a remote possibility. Accordingly, if I should devise an estate to your sons to be born of a second wife, while a first is living, this would be void for remoteness. So if I should devise an estate to some person to take effect after a general failure of your heirs, without first devising the estate to you and your heirs, such devise would be void for remoteness.

The foregoing observations on reversions and remainders, have applied exclusively to realty. In the law of personalty no such distinctions are known, because there are no reasons for them. On account of the moveable and transitory nature of personalty, there are few occasions when it is desirable to make a future disposition of any specific article; and therefore the law makes no provision for such disposition. But a future amount of value, either in money or goods, may be stipulated for, in the ordinary course of contracts; and by recourse to trustees, as will be explained hereafter, future settlements of personalty can be made, as well as of realty. What, therefore, you are here to remember, is that there is no technical reversion or remainder in any specific article of personalty.

The view I have taken of estates in remainder, is too brief and general to do any thing more than excite your curiosity to examine further; unless perhaps it should lead you to discuss the policy of adhering to rules, when the reasons of them no longer exist. There is clearly no absolute necessity for perpetuating a branch of law so purely arbitrary and technical. A few brief statutory provisions would enable persons to make future dispositions of realty, as easily as of personalty, and to any extent which might be deemed expedient. Let it be expressly provided, that any estate might be made, by deed or will, to commence at a future period; and that where several successive estates should thus be created, the failure of any one should not affect the rest; but the lapsed estate should revert to the grantor or his heirs, until the next estate could take effect; and the whole fabric of remainders would fall to the ground. I hope the day is not far distant, when such a reform will be undertaken.

LECTURE XXIII.

ESTATES IN COMMON.(a)

§ 139. *Different kinds of joint ownership.* I have hitherto spoken of estates as if they belonged to a single person. But in the estates before described, several persons may have a common interest. I speak not now of corporations, which may happen to own realty; because the interest of corporations, whether in personality or realty, is of the same nature, being measured by the shares they hold; which shares only give them an interest in the *proceeds* of the corporate property; and not an interest in the specific property itself. But I refer to natural persons having an undivided interest in the same parcel of realty, no matter how acquired; and in this lecture I am to explain the light in which the law regards such common interest. At common law, estates were divided, with respect to the number of owners, into four classes; namely, estates *in severalty*, *in joint tenancy*, *in coparcenary*, and *in common*. But an estate in severalty means nothing more than that the land belongs to a single owner, and therefore requires no comment. With respect to the other three estates, the distinctions at common law were numerous and important. In this state, however, the prevailing sentiment in favor of simplicity, has reduced these three estates to one; namely, an estate in common. As this is an important proposition, I will briefly state the grounds on which it rests. In the *first* place, our legislature has generally treated them as one. In the *second* place, our court has expressly decided,(b) that *joint tenancies* do not exist in Ohio. The case was one where land had been devised to husband and wife, by such words as at common law, would have created a joint tenancy, in any other persons; and in husband and wife would have given each the entirety, with the indestructible *right of survivorship*; for as neither could sever the jointure, the whole would belong to the survivor. But the court said, that inasmuch as our legislature had uniformly treated a joint tenancy as a tenancy in common, and inasmuch as the right of survivorship, which cuts off the heirs of the deceased joint tenant, is not conformable to the spirit of our institutions, or the feelings of our people, they would not recognize a joint tenancy. And as the same reasons applied to the peculiar tenancy

(a) See 2 Black. chap. 12; 2 Kent, lec. 64; 1 Swift's Dig. b. 2, chap. 10; 2 Cruise's Dig. 497; 1 Hilliard's Dig. chap. 53—55, page 429—462.

(b) Sergeant v. Steinberger, 2 Ohio, 306; White v. Sayre, 2 Ohio, 103; Miles v. Fisher, 10 Ohio, 1.

of husband and wife, it should be treated as a tenancy in common. And in another case, where the devise expressly specified that the devisees should hold as joint tenants, and not as tenants in common, it was held that they were tenants in common. In the *third* place, although it has never been decided that co-parceners differ in no respect from tenants in common, yet this follows from the reason above given, that our legislature has uniformly treated them as the same. The single exception with respect to *waste*, only strengthens this conclusion; for at common law, one joint tenant or tenant in common might maintain an action for waste against another, but a co-parcener could not. So that our statute by extending this privilege to a co-parcener, only operates to do away the sole remaining difference between tenants in common and co-parceners.

§ 140. *Tenants in common.* (a) The leading incidents of estates in common are as follows: 1. The only *unity* required between tenants in common, is the unity of possession. They may differ in regard to interest, title, and time. They own undivided parts, and occupy promiscuously, because neither knows his own severalty. In legal language, they take by distinct moieties, and have no entirety of interest; and therefore, there is no right of survivorship, as there would be in a joint tenancy; but on the death of either, his undivided interest descends to his heirs. 2. Tenants in common may have *partition* made at any time, by pursuing the course pointed out in the statute, and thus become tenants in severalty. Or they may make partition by mutual agreement. The proceedings in partition will be described hereafter. 3. Tenants in common may maintain waste against each other, the nature of which has been already described. 4. The possession of one tenant in common is the possession of the other. Therefore neither becomes a trespasser by entering upon any part of the common premises; but if one *actually ousts* the other, and claims the whole to himself, ejectment may be brought against him. Nor does an actual ouster imply force. Whenever one tenant in common, either by words or actions, denies the common tenancy, and claims to hold the whole, as exclusive owner, this will be equivalent to an actual ouster. But the mere taking of all the rents by one, will not amount to such ouster. The other can only compel him to account in equity. 5. Estates in common are liable to curtesy and dower, and are alienable, descendible, and devisable, like any other estates. These various matters will be explained hereafter. 6. Tenants in common may be compelled to contribute for *necessary repairs*, but not for new improvements; the law presuming that the former must be beneficial to all concerned. 7. Tenants in common may convey their

(a) See 2 Black. 191; 4 Kent, 367; 2 Cruise's Dig. 549; 1 Hilliard's Dig. chap. 54, page 438.

undivided shares in the same manner as property held in severalty; but it is generally held that one tenant in common cannot convey a *distinct portion* of the common estate, by metes and bounds. Our court, (a) however, has decided differently. The facts were, that partition was made among eight heirs, and the portions set off to each. The plaintiff purchased three of these shares, and took separate deeds from each of the owners. After this, the partition was set aside for error. The plaintiff then brought ejectment. The court held that he could recover one undivided eighth part of the land conveyed by each of the deeds. The correctness of this decision is very questionable; and in the dissenting opinion of Judge Burnet, the objections to it are placed in a very strong light. The decision, in fact, amounts to this, that one tenant in common may of himself make a partition, which shall bind the rest. 8. Where partners hold real estate, they are treated in all respects as tenants in common. 9. Tenants in common must join in an action of trespass and in debt for rent; but in ejectment they have an option, either to join or sever. It has been said that they cannot declare on a *joint demise*, because tenants in common cannot in fact make a joint demise; but such is not the law here. By our statute they may either declare on a joint demise or on several demises. These matters will be better understood hereafter, when we come to consider the technicalities of practice.

§ 141. *Joint interest in personalty.* (b) In general the joint owners of personalty are partners, whose relation to each other, has already been described. Their interest is rather that of joint tenants, than of tenants in common; because there is a qualified right of survivorship. And this is true generally of all joint interests in personalty, though the owners be not strictly partners. Either of the joint owners may control the possession, and even transfer the title, during the lives of all; and when either of them dies, this power remains in the survivors. The representatives of the deceased can only call the survivors to account for their doings, and for a proper share of the ultimate proceeds of their management. Nor can any one of the joint owners convey his undivided share of any specific article to a third person. To avoid the effect of any of these rules of law, recourse must be had to chancery. But the maritime law makes an exception with respect to ownership of vessels, which extends also to steamboats and other kinds of water craft used on our interior waters. Joint owners of vessels are called *part owners*, (c) to distinguish them from partners. They are strictly tenants in common; for each part owner may dispose of his undivided share during life, and at death it goes to his representatives. Nor can one of the part

(a) See *White v. Sayre*, 2 Ohio Rep. 110.

(b) 2 Kent, 350.

(c) *Abbot on Shipping*, 68—84; 3 Kent, 151.

owners control or dispose of the vessel without authority from the rest. A court of admiralty will even restrain a majority from employing a vessel against the will of the minority, without giving them security.

I have heretofore mentioned the consolidation of all tenancies of realty, into that of a tenancy in common, as one of the instances in which our land law has been simplified. The brevity of this lecture proves this proposition. It would have required four times the space to discuss this title of the English law, even in the same general manner. Here then we have a decided gain on the score of simplicity, and without any countervailing disadvantage.

LECTURE XXIV.

ESTATES UPON CONDITION.

§ 142. *Conditions in general.* (a) Hitherto I have considered estates only in their simple and absolute character, unaffected by any conditions or qualifications; but in the creation of estates, it often happens that certain conditions are annexed, according to which they either become vested, enlarged or defeated; and these conditions may be as various as the dispositions of men. They are not however of frequent occurrence here, our conveyances being generally of the most simple character. With the exception of leases and mortgages, which form classes by themselves, we rarely meet with conditions in a deed; whereas in the English law they are very frequent. Indeed, under the feudal system, as we have seen, all estates were held upon conditions, on failure of which, they might be resumed by the lord of whom they were held. I shall give a very general description of the conditions which may be met with here, and of the rules which govern them. Conditions may be annexed to estates in fee, for life, and for years. Thus, if I grant an estate to you and your heirs, so long as you continue to reside in this state, this would be a conditional fee. It is a fee, because it may continue for ever; but since its continuance depends upon your residing in this state, it is called a *qualified, base, or determinable fee*. Again, if I grant an estate to you as long as you continue in a certain occupation, this is in like manner, a conditional estate for life. Lastly, if I

(a) 2 Black. chap. 10; 4 Kent, lec. 57; 1 Hilliard's Dig. chap. 27—28, page 247—255.

lease you an estate for a term of years, on condition that you occupy it in a certain way, this is a conditional estate for years. Conditions are either *express* or *implied*. Express conditions are those which are inserted in the deed, and are called *conditions in deed*. Implied conditions are those which are created by the common or statute law, without express words in the deed. But as none of the examples of implied conditions which are given in the books, will apply to the law of this state, we should probably be safe in saying that none but express conditions would be here recognized. Again, conditions are either *precedent* or *subsequent*. Conditions precedent, are those that must be performed before the estate can commence. Thus if I grant you an estate upon your marrying a particular person, this is a condition precedent; you must marry before taking the estate. Conditions subsequent are those upon the failure of which, an estate already vested is defeated. Thus if I grant you an estate so long as you reside upon it, this is a condition subsequent. Besides these there are also conditions which operate to enlarge a vested estate. Thus I may grant you an estate for life, with the condition that if you have children, it shall be an estate in fee. This condition although subsequent to the commencement of your estate, is precedent to its enlargement, and therefore strictly belongs to neither of the above classes. The most important rules relating to conditions are the following.

1. Conditions must be annexed at the time of creating the estate, and not afterwards; because when an estate is once created, the grantor's power is at an end. Accordingly, if the conditions are contained in a separate deed, both must be executed at the same time.

2. Conditions must operate upon the whole estate. If I should grant you an estate in fee, with a provision that upon the happening of a certain event, your estate should cease for a certain number of years, this would not be good, it is said, because it would destroy the unity of the estate. But a condition may operate upon part of the land, and not upon the rest. Thus one half might be made to revert, upon a certain event. There may be good reason for this distinction under the technical rules of the common law, but I can perceive none in the nature of the subject.

3. Conditions can only be reserved to the grantor and his heirs. Except by statutory provision, which we have not, they cannot be reserved to strangers. The reason assigned is, that estates upon condition, do not, *ipso facto*, cease upon the happening of the condition, but only when there has been an *entry* for condition broken, or some act equivalent thereto, as the commencement of an action. In order to discourage *champerty* and *maintenance*, (a) or the fomenting of litigation, it was a maxim of the

(a) See 4 Black. 134; Key v. Vattier, 1 Ohio Rep. 141.

English law, as we have seen, that no right of action could be assigned by one person to another. Consequently the right of entry for condition broken, could not be reserved to a stranger. But here the reason of this rule does not exist, because we have no law against champerty or maintenance. The doctrine, however, that there must be an *entry*, to defeat an estate upon condition, has been recognized by our court, (a) and it was held that the bringing an ejectment was equivalent thereto. In this respect, an estate upon condition, differs from a *conditional limitation*. For example, if I simply grant you an estate upon condition of your remaining in Ohio, and you break the condition by removing, either I or my heirs must enter and assert our claim, in order to defeat your estate; and until we do so, the estate continues in you. But if I make a conditional limitation, by granting an estate to you so long as you remain in Ohio, and then to another person, the very act of removing defeats your estate; and it vests instantly in the next person, without any act done by him.

4. Conditions which are impossible at the time of making them, or which afterwards become impossible by the act of God, or by the act of the grantor himself, are void; and an estate already vested thus becomes absolute. The reason is, that the moment that a condition becomes impossible, it ceases to be a condition in the sense intended by the grant; and when this is not the fault of the grantee, he is not to be prejudiced thereby. Accordingly, the estate being vested, he holds it discharged of the condition. Thus if I should grant you an estate, upon condition that within five years you should marry a certain woman, and she should be dead at the time, or should die within the five years; or I should marry her; in either case you would hold the estate discharged of the condition.

5. Conditions, the performance of which is unlawful, are void. Thus if I grant you an estate, the continuance of which depends upon your doing something which is illegal, or immoral; or omitting something which is your duty, the condition is void, and the estate which is vested becomes absolute.

6. Conditions which are repugnant to the nature of the estate, are void. Thus if I grant you an estate in fee, upon condition that you shall not part with it, or shall not receive the profits of it, these conditions would be void for repugnancy, since the rights of alienation, and of taking the profits, are the essential incidents of an estate in fee. But the grantor may prohibit alienation, to a particular person; for this is not within the reason of the rule. So if the estate be for life or years, a condition against alienation will be good, for here is no repugnancy to the nature of the estate. And in this case, a sale on execution will not be considered as an alienation so as to defeat the estate.

(a) Sperry v. Pond, 5 Ohio Rep. 387.

7. Conditions in absolute prevention of marriage are void on grounds of public policy, except in the case of widows taking lands from their deceased husbands. But the grantor may provide that the grantee shall not marry without his consent ; because this does not absolutely prevent marriage.

8. Conditions may be performed by any person having an interest in the subject matter. And if a particular time be appointed, the performance must be at or before the time. The law is strict on this subject, though equity will relieve against mere failure in point of time.

9. Equity will relieve against all forfeitures for breach of conditions, where a compensation can be made in damages ; and this renders the legal doctrines respecting conditions of little practical consequence.

10. When the condition has been broken, the grantor may, by his own act, debar himself from taking advantage of it. Thus, where a lease contains a clause of re-entry, for non-payment of rent at a certain time, and the lessor accepts rent afterwards, he cannot enter for condition broken.

§ 143. *Estates tail.*(a) My limits will not allow a further consideration of the general subject of estates upon condition. But there are certain particular estates upon condition, known by specific names, which, though not in existence here, require a brief notice, on account of the frequent reference made to them by way of illustration and analogy. These are *estates tail*, *estates by statute merchant*, *by statute staple*, and *by elegit*. And first, *estates tail*. An estate tail is an estate given to a man and some particular description of his heirs, to the exclusion of all other heirs. It was originally treated as a fee simple, upon condition that the grantee had the required heirs ; and accordingly, as soon as the condition was performed, by the birth of the specified heirs, the estate became absolute. But as this construction tended to defeat the design of creating the estate—which was to tie up the property from alienation, and create a perpetuity in particular families,—the aristocracy of England had influence enough to procure the enactment of the famous statute, *de donis conditionalibus*, the effect of which was to fetter an estate tail, with the ancient restraints upon alienation. The estate was to go to the stipulated heirs at all events, if there were such ; and if not, to revert to the donor. With the long struggles in England to avoid the effect of this statute, I shall not occupy your time. Happily, estates tail have been rare in this country. They were introduced here before the revolution, but were so manifestly opposed to the spirit of our republican institutions, which favor a free distribution of property, that most, if not all of the states, have altogether prohibited them. This is partially the case in

(a) See 2 Black. 110 ; 4 Kent, 12—15.

Ohio. By the act of 1811, (a) no estate can be in any way limited to any persons, but such as are in being at the time, and their immediate issue or descendants; and all estates attempted to be entailed, become absolute fees in the issue of the first grantee in tail. Thus by a statute of ten lines, while the dead are prevented from domineering over their posterity, by means of restraints upon their property, the students of law are relieved from investigating this extensive and intricate branch of English jurisprudence.

§ 144. *Estates by statute merchant, staple, and elegit.* (b) The object of these three estates was the same; namely, to make land available to pay debts. Under the feudal system, real estate could not be made available to a creditor, because there was no process by which it could be reached. The first act making land chargeable with debts, was the *statute de mercatoribus*, or *statute merchant*, passed in 1284; and the second was the *statute staple*, passed in 1354. Both these were designed for the benefit of commerce, and originally confined to traders. They enabled creditors of this description to secure debts acknowledged to be due, by taking possession of the debtor's land, and appropriating the profits until their debts were satisfied; and while so in possession, they were called tenants by *statute merchant*, or *statute staple*, as the case might be. It follows that they held possession upon condition subsequent. We have had nothing similar to these provisions in this country. The estate by *elegit* was created the same year as that by statute merchant, for the common benefit of all judgment creditors, whether merchants or not. The judgment creditor, who until then had recourse only upon the body, goods, and annual profits of the lands of his debtor, was allowed his *election*, in case there was not sufficient personalty, to take possession of one half of his lands, until the debt was paid out of the rents and profits; and while so in possession, he was called *tenant by elegit*: this estate, therefore, like the other two, was an estate upon condition subsequent. We once had something like it, as will be seen by referring to our early laws on the subject of judgment and execution; but the modern policy has been to sell the land at once on execution, as will be explained hereafter. I have barely alluded to these estates, because frequently referred to for analogies.

The remarks hitherto made have related exclusively to realty. Conditions may, however, be annexed to personalty, in the common course of business transactions. But as their nature and effect will always depend upon the terms of the contract by which they are created, they involve no technical questions of law which require notice here. The most common cases of personalty held upon condition, are those coming under the head of

(a) King v. Beck, 12 Ohio, 390.

(b) See 2 Black. 160.

bailments, which will be considered hereafter in connection with contracts. I therefore leave the subject of estates upon condition, with the remark that this title furnishes still another instance of the simplicity of our law of real property, compared with the ancient English law.

LECTURE XXV.

MORTGAGES. (a)

§ 145. *Object of a mortgage.* I have already observed that mortgages are usually treated under the head of estates upon condition. But their practical importance makes it proper to devote to them a distinct lecture. They are pledges to secure the payment of money; and in the present wide extension of credit, they form one of the most frequent subjects of judicial cognizance. The law which governs them is the common law modified by a very few statutory provisions. Of the derivation of the word *mortgage*, Blackstone gives, in substance, this account. *Vivum vadium*, or living pledge, is when a debtor pledges land to his creditor, to hold until the debt is paid out of the rents and profits: this is likewise called a Welsh mortgage. *Mortuum vadium*, dead pledge, or *mortgage*, is where a debtor actually conveys land to his creditor, upon condition that the conveyance shall be void, if the debt be paid at a given time; but otherwise shall be absolute. In the former case, which now rarely if ever occurs, the debtor still retains a subsisting title to the land, though incumbered by the debt to be paid from the rents and profits. In the latter case, which is that of the common mortgage, the debtor, by the terms of the conveyance, retains no subsisting title; and therefore the pledge is said to be *dead*; though in fact, as we shall see, the law still gives him a subsisting interest, not warranted by the terms of the conveyance. The object of a mortgage, as already stated, is to secure the payment of money by a pledge of real estate; but the law of mortgages has in the course of time undergone so many changes, that scarcely one of the original doctrines on the subject now remains. I shall describe the *form* of a mortgage, in its proper connection with other deeds. But for the purpose of being understood in my present remarks, I will here observe, that in form, a mortgage differs in no respect from a common deed of conveyance in fee simple, except in the *condition of defeasance*.

(a) See 2 Black. 157; 4 Kent, lec. 58; 2 Cruise, 82; 1 Hilliard, chap. 29—39; and the treatises of Powell and Coote.

And if its legal import were now to be gathered from its words, it would be the conveyance by the mortgagor to the mortgagee of an estate in fee simple, upon condition that if the stipulated sum of money for which the mortgage is given, were paid upon a fixed day, the estate should revert to the mortgagor; but otherwise, should become absolute in the mortgagee. Accordingly the mortgagee would take immediate possession, and exercise all acts of ownership, until the pay-day arrived, and then would either give it up or hold it absolutely, according to the fact of payment or non-payment. Such, I say, would be the inference drawn from the form and language of a mortgage; and such was in fact the early construction given to it by law: but such is not now the construction; and it is matter of regret that the form of the instrument has not been changed with the law, so that the words might now express the present legal nature of the transaction.

§ 146. *Right of redemption.* The original construction of a mortgage as just explained, was found to be productive of extreme hardship. Land is often mortgaged to secure a debt much less than its value; and if a failure to pay this debt punctually at the day, were to involve the forfeiture of the land absolutely, the mortgagee would obtain an unconscionable advantage. On this ground, the court of equity early took up the subject, and allowed the mortgagor to redeem the land, after the time stipulated, by paying the debt and interest, provided this were done within the period allowed for bringing an action of ejectment, which is here twenty-one years. This right is thence called an *equity of redemption*; and it extends to the heirs and assigns of the mortgagor, and to every other person interested in the lands; the grand principle being, that the only right of the mortgagee is to be secured for his debt.

§ 147. *Right of foreclosure.* Had the interference of equity stopped here, the mortgagor would have had the advantage; for though the mortgagee should obtain possession of the land, yet for the period of twenty-one years, he would not dare to make any valuable improvements, because he would be liable to lose them, by a redemption of the land; and if the land happened to rise in value in the mean time, faster than the interest increased, this would be wholly for the benefit of the mortgagor when he chose to redeem; whereas, if it should greatly depreciate, the loss might fall entirely on the mortgagee. For these reasons, the court of equity interfered again, in favor of the mortgagee, and allowed him at any time within twenty-one years from the day the money fell due, to *foreclose the mortgage*; or, in other words, to cut off the equity of redemption, and thus quiet his title. But this was required to be done upon such terms as were just and equitable for both parties. The rule here adopted is this: (a)

(a) See Anonymous case, 1 Ohio Rep. 235; Allen's Lessee v. Parish, 3 Ohio Rep. 187.

the land is appraised, as for sale on execution; and if two thirds of the valuation exceed the debt and interest, the land is sold at public auction, and the surplus proceeds paid over to the mortgagor; if not, the title is passed in fee simple to the mortgagee, and the right to redeem for ever taken away: but in this latter case, if the real value of the land is less than the debt and interest, the mortgagee still has his right of action against the mortgagor, for the deficiency. This equitable proceeding by foreclosure, in which all the parties interested in the mortgaged premises are brought before the court, and their claims adjusted, is the only one by which the equity of redemption can be cut off.

§ 148. *Other incidents.* (a) These leading determinations of equity have led to very essential modifications in the legal character of a mortgage. The execution and delivery of the instrument no longer create an estate upon condition in the mortgagee, but simply give him a lien; while the legal title to the land continues in the mortgagor, to all intents and purposes, until default of payment; so that he can exercise all acts of ownership over it, precisely as if no mortgage had been made. And even after default, the title does not pass *ipso facto* to the mortgagee. The default only lays the foundation for an action of ejectment, by which the mortgagee may obtain possession of the premises. This however does not affect the equity of redemption, which still continues in the mortgagor, until cut off by lapse of time or foreclosure; and is, in the mean time, descendible and transferable like any other legal estate. The only restriction upon the power of the mortgagor, while he continues in possession, is, that he cannot commit *waste*; that is to say, a court of equity will interfere by injunction, to prevent any act which will impair the mortgagee's security; though if waste were actually committed, a court of law could give no remedy, because the mortgagee is not now considered the legal owner of the estate. His rights before ejectment or foreclosure, are all determined by the leading principle, that the mortgage is now a mere security for a debt. The mortgagee, therefore, has nothing but a *specific lien* upon the land; that is, a power of subjecting it to the payment of his debt, by taking the proper steps, in preference to any other creditor or subsequent incumbrancer. He has not an estate in the land, but a mere inchoate right which may be strengthened into an estate. His interest is not liable to be sold on execution, but may be made available to his creditor by proceedings in equity. It is likewise capable of being assigned or transmitted, in the same manner as a chattel, being considered of no higher nature. Our statute expressly provides that if a mortgagee die before foreclosure, the debt and mortgage shall be personal assets in the

(a) Ely v. M'Guire, 2 Ohio Rep. 223; Phelps v. Butler, 2 Ohio Rep. 225; Miami Exp. Co. v. Bank U. S., Wright's Rep. 249.

hands of the executor or administrator; and if possession be obtained by them, they shall hold in trust for the persons who would have been entitled to the money, if the debt had been paid. This general view of the present nature of a mortgage, shows that the interest of the mortgagee is no longer an *estate upon condition*, in the strict sense of that phrase; since even after the condition is broken, he cannot obtain possession without the intervention of a court; and that in fact the execution of a mortgage cannot now be said to create a legal estate of any description in the mortgagee. It is only therefore in compliance with custom, that I have treated the subject under the head of legal estates; for it would fall more properly under that of *equitable estates*. But I will now state a few other matters, serving still further to illustrate the rights of the parties.

The mortgagee has three modes of collecting his debt, which he may pursue either successively or simultaneously, as he chooses. These are an action of contract for the money, an action of ejectment for the land, and a bill of foreclosure in chancery. If all are pursued at the same time, a satisfaction in either way, will of course bar proceedings in the other. In this state, from 1795 to 1831, there was an additional remedy, *by scire facias*, created by statute; and it was held that a resort to this remedy precluded other proceedings. But this superfluous remedy is now taken away; and it would be well if the others could be in some way consolidated, or the option restricted. When the mortgaged property is sufficient to satisfy the debt, the most common and effectual mode of proceeding is by foreclosure; and it has been decided, that, if there be several instalments, this course may be adopted when the first becomes due, though it be only of the interest. Whether ejectment can be brought until all the payments are due, I do not find decided. But from the general maxim, that a condition cannot be apportioned in law, it would seem that all the payments must be due, before the mortgage, considered as a legal conveyance, is forfeited, so as to lay the foundation of this action. The only objections to the remedy by foreclosure are the expense and delay attending it. But an expedient has been adopted to obviate these; which is to give the mortgagee a *power of attorney* in the mortgage itself, to sell the mortgaged premises, on default of payment, without recourse to a court of chancery; and account for the surplus to the mortgagor. Owing to the maxim, "once a mortgage, always a mortgage," it has been doubted whether a sale under such a power, unless the mortgagor joined in the conveyance, would cut off his equity of redemption; but it is now settled that such a sale, fairly conducted, will be conclusive against him; and to insure fairness, the power is sometimes conferred on a third person; but this is not absolutely necessary. This power to sell is in its nature irrevocable, and passes to any assignee of the mortgage; being coupled with an

interest, as has been explained before. The only doubt therefore is, whether such sale will be conclusive against subsequent mortgagees, or whether they may still redeem, by indemnifying the purchaser; but as they have notice of the power to sell, and may bid at the sale, I see not how they can have any claim to redeem. It is usual to accompany the mortgage with a bond or note for the money; but this is not essential. A mortgage may be taken to secure future advances and responsibilities, if this intention be clearly expressed in the mortgage. But when the debt is evidenced by a bond or note, the holder can assign the mortgage by a simple indorsement of the bond or note; for the security follows the debt as an incident.

If there be several mortgages, their respective priorities are determined by the record. Formerly our law allowed a mortgage recorded within six months, to take effect from date. But now the provision is that mortgages shall take effect from the time of presentation to the recorder; and thus a wide door to fraud is effectually closed. If however a subsequent mortgagee have actual notice of a prior unrecorded mortgage, at the time of taking his mortgage, the fact of placing his mortgage first on record, will not give him the priority; for this would be to convert the statutory provision into an instrument of fraud, by placing constructive above actual notice. The American doctrine is, that if a deed be properly executed, the record is constructive notice to all the world; and precludes the averment by another of a want of actual notice; but it is not the only notice, which the law will recognize. Again, the English doctrine of *tacking* a subsequent debt upon a prior mortgage, so as to cut out an intermediate debt due to another, has never been adopted here, on account of its manifest incompatibility with our doctrine of notice. Each comes in according to his priority; and whoever may commence proceedings, the oldest lien is first satisfied. It is provided by our statute, that when the mortgagee shall have entered satisfaction of the mortgage, either upon the mortgage itself or upon the record, such entry shall operate as a release of the mortgage; and it has been decided that the mere fact of payment discharges the mortgage, and that this may be proved by parol. (a)

§ 149. *Mortgage of personalty.* (b) The foregoing remarks have related to *realty*; but personalty may also be mortgaged. A mortgage of personalty differs from one of realty, chiefly in one particular; namely, as to the party who shall have *possession* during the mortgage. As possession of personalty is usually taken by the world to be evidence of ownership, and credit given accordingly; and as there are no records of personalty where

(a) Hill v. West, 8 Ohio, 222.

(b) See 4 Kent, 138; Story on Bailments, 196; Miller v. Cassily, Wright's Rep. 238.

titles can be traced and incumbrances ascertained; it would seem to be the policy of the law, in order to prevent fraud upon third persons, that the mortgagee should have possession of the thing mortgaged. But the decisions only go to this extent, that where the retaining of possession by the mortgagor produces actual fraud upon third persons, the rights of the mortgagee are postponed to theirs; but where third persons are not actually defrauded, the mortgage is good to the mortgagee, though the mortgagor retains possession. In other respects, the rights and remedies of the parties, are nearly the same as with respect to realty. If the mortgagee be not in possession, he may, on default, either obtain possession by action at law, or foreclose by suit in chancery. If he be in possession, there is no occasion for a bill of foreclosure. In this case the mortgage does not differ from a pledge or pawn, to which possession is essential, except in the mere form of the writing. When the mortgagee is in possession, and there is a default, he may sell, on reasonable notice to the mortgagor; but until sale, the right of redemption continues. If no pay day be fixed, there may be a redemption at any time before sale on notice. But there are some cases where the mortgagee of chattels never has possession; as maritime pledges, on *bottomry* and *respondentia*, (a) which the master of a ship is authorized to make in a foreign port, in cases of necessity. To secure a loan on *bottomry*, the ship and freight are hypothecated to the lender. To secure a loan on *respondentia*, the cargo only is hypothecated. In neither case, of course, does possession accompany the pledge; and the hypothecation is evidenced by bond. The lender stands in the place of an insurer, for he takes the risk of the voyage. If the ship or cargo be lost he receives nothing; if not, he receives the principal loaned, and the extraordinary interest agreed upon; and he has a lien upon the thing hypothecated, for payment.

LECTURE XXVI.

EQUITABLE ESTATES. (b)

§ 150. *In what they consist.* The estates before described, with the exception of mortgages, are strictly *legal estates*; that is,

(a) 3 Kent, lec. 49.

(b) See 2 Black. 327; 4 Kent, lec. 61, 62; the title *Uses and Trusts* in the Digests of Hilliard and Cruise; Bacon on *Uses*; Saunders on *Uses and Trusts*.

such as courts of law can recognize and enforce. And in the earliest period of the English law, no other estates were known. But the institution of a court of chancery has given rise to another kind of estates, which may be denominated *equitable*, and which now occupy a very important place in the law of realty. It is not common in the books, to find such a title as *equitable estates*; but I have selected it for the purpose of discussing a variety of rules relating to property, which could not well be embraced under any other head; and which are essential to a proper understanding of this branch of law. By an equitable estate is meant any right or interest in land, which, not having the properties of a legal estate, requires the aid of a court of chancery to make it available. What are the requisites of a legal estate will be explained hereafter. It may be laid down in the mean time as a general proposition, that whenever one man has a legal title to land, to which another, on the established principles of equity, has a right, the latter may, by recourse to a court of chancery, render his equitable title available against the legal title. In all such cases, the owner of the legal estate is held to be a *trustee*, for the owner of the equitable estate: and chancery will compel him to execute the *trust*, for the *use* of the latter. Hence equitable estates have acquired the name of *uses* or *trusts*; under which name their properties will be now considered.

§ 151. *Origin of uses and trusts.* (a) In the civil law, a distinction existed between a right to enjoy the rents and profits of land, and a right of property in the land itself; and thus one person might have the naked legal ownership, while the whole beneficial interest belonged to another. In the early part of the fourteenth century, this distinction was introduced into the English law through ecclesiastical influence. The efforts of the church to enrich itself by the acquisition of lands had been opposed by a series of statutes, known as the *statutes of mortmain*, (b) the object of which was, to disable religious corporations from receiving conveyances of real estate. But these various restrictions related to legal estates only; and to avoid their effect, recourse was had by the clergy to the above distinction made in the civil law. Conveyances, therefore, instead of being made directly to the church, were made to individuals, with the understanding that the church was to have the beneficial enjoyment. This usufructuary or beneficial interest, thus separated from the legal ownership, was denominated *use*; and the court of chancery, then directed by the clergy, assumed the entire jurisdiction of *uses*, on the ground that they were exclusively matters of *conscience*, and not of law. By degrees, therefore, under the decision of shrewd and interested chancellors, the doctrine of uses grew up into a regular and established system. For various reasons, the *use* of

(a) 2 Black. 327, 332.

(b) 2 Black. 268.

land, thus severed from the *legal ownership*, was deemed a more beneficial estate than where both the use and the legal title were united. It was discharged from all the feudal burthens; was not liable to forfeiture for treason; and could be transferred from hand to hand, without the tedious formalities of the common law. For these and other reasons, individuals, who were not within the statutes of mortmain, entertained a decided preference to uses over legal estates. The consequence was, that by the end of the fifteenth century, a large proportion of the real property of the kingdom was incumbered in this complicated and double manner; one person having the legal estate and another the use. This state of things gave rise to a series of legislative acts, which ended with the enactment, in 1536, of the celebrated *statute of uses*, of which some account must now be given. The intention of this statute was to destroy the double property in land, which had resulted from the introduction of uses; not by destroying the use, but by changing it from an equitable into a legal estate. Accordingly, it was enacted in substance, that whenever one person was *seised* of land for the use of another, he who had the use, should *ipso facto* have a legal estate of the same measure and quality. Wherever this statute could operate, therefore, its effect was to abolish the intervening legal estate, by annexing it to the use and making that a legal estate; and had the language of the statute been as comprehensive and explicit as its object required, the court of chancery would have been completely deprived of its jurisdiction over real property, which was the main motive of the provision. But this effect was not produced; and after a long and severe contest between the courts of law and chancery, the doctrines of *uses* were revived under the name of *trusts*. The great preliminary question under the statute, was, whether the statute *executed the use*; that is, converted it into a legal estate. If it did, the jurisdiction belonged to the courts of law; if not, to the courts of chancery. Of the manner in which the object of the statute was thus defeated I can speak but briefly. In the first place, it did not in its letter, include *estates for years*, but only *freeholds*; and of course *trust terms* to any length could be created to evade it. But a more effectual mode of evasion was this. A conveyance was made to A, for the use of B, in trust for C. The statute was construed as only transferring the legal estate from A to B. Here its operation terminated. B then took the legal estate in trust for C; which trust the court of chancery stood ready to enforce. And thus, after a series of protracted and bitter discussions, a statute from which so much had been expected, resulted only in changing the name of an equitable interest from *use* to *trust*. But happily for us, the mass of learning connected with this statute has here no other than a speculative interest; for if it was ever in force in this state, it certainly has not been in

force since 1806. The question arose in one case, (a) and the court was divided in opinion; two of the judges holding that the statute was in force here from 1795 to 1806, and two holding that it never was in force. But whatever opinion may be formed on this point, it is admitted on all hands, that the statute has not been in force here since 1806; and this is enough for our purpose; for the important consequence follows, that we retain the original doctrines of uses as settled in chancery, without any of the subsequent doctrines derived from the statute. In other words, uses and trusts are here synonymous terms, and belong exclusively to chancery jurisdiction. We shall see hereafter, that our only conveyances, are those which originated under the statute of uses; but in all other respects, our law of real property is the same as if that statute had never been enacted. I shall consider equitable estates under two heads, *express trusts* and *implied trusts*; confining myself to a very general outline of their nature and properties.

§ 152. *Express trusts.* Our *statute of frauds*, which will be considered hereafter, requires all transactions relating to land, to be expressed in writing. The English statute of frauds contained a special exception in regard to trusts. Our statute does not make this exception, but it is held to be implied. The doctrine is so universal, that *implied trusts* will be enforced in equity, that without citing authorities to prove it, I shall take it for granted; and shall therefore speak of *express trusts* as a *distinct class*. In the creation of every express trust, three parties are concerned; *first*, the person who creates the trust, and who is called the *grantor*; *secondly*, the person who is to execute the trust, and who is called the *trustee*; *thirdly*, the person for whose benefit the trust is made, and who has been designated by the awkward phrase of *cestui que trust*; in the place of which, I shall substitute the term *beneficiary*. The parties will then be grantor, trustee, and beneficiary. With these explanations, I proceed to a summary description of the leading properties of express trusts.

1. Express trusts are usually declared in the same instrument which creates the legal estate; but this is not always the case. Land may be conveyed to a trustee upon such trusts as the grantor, or some other person named in the conveyance, shall afterwards declare; and in either case the trustee will hold the land subject to these future declarations.

2. All persons may convey land in trust, who are capable of making a deed or will. Who these are will be pointed out hereafter.

3. All persons may be made trustees, not excepting infants or married women; because the mere capacity of being a trustee

(a) *Thompson v. Gibson*, 2 Ohio Rep. 339.

involves nothing more than the capacity of receiving a legal conveyance. It is obvious indeed that there may be certain acts required in the execution of a trust, to which persons under disability would not be legally competent in their own right. But in such cases, the power conferred by the grantor, gives the trustee a capacity, which the law does not give; for example, in the execution of a trust, an infant, or a married woman without her husband, may make a valid conveyance.

4. All persons without exception, may be beneficiaries; since no disability whatever can disqualify one for enjoying the benefit of a trust properly created.

5. Every description of property, real or personal, is capable of being settled in trust; there being no valuable thing which one man may not hold for the benefit of another.

6. Express trusts of realty, when properly created, attach to the land itself, and not merely to the person of the trustee. Therefore, if a proper trustee should be afterwards wanted, chancery will see that the trust is executed by any person having a legal title to the land.

7. Trust estates are in all valuable respects as beneficial as legal estates. Where the contrary is not expressly provided, they are in like manner alienable, devisible, and descendible. They cannot indeed be sold on execution; but they may be made liable for debts by analogous proceedings in chancery, which will be explained hereafter. They are also equally liable to curtesy and dower. Formerly by force of some early and arbitrary decisions they were not liable in any case to dower, but this distinction does not exist here.

8. Trust estates may not only be limited in remainder to the same extent as legal estates, but owing to what may be called their flexibility or elasticity, they are susceptible of a much greater variety of future provisions. For while the legal estate continues in the same trustees, the beneficial interest may be made to shift from hand to hand, almost at the pleasure of the grantor. Thus he may omit to declare the trust at first, and reserve to himself or others the right of future appointment in such manner as he chooses; or he may declare a trust at first, subject to future revocation, and may afterwards revoke the trust, and declare a new one; or he may declare trusts to arise of themselves, upon future contingencies, reserving the enjoyment of them to himself in the mean time; or lastly, he may declare trusts to take effect immediately, and yet be capable of changing of themselves, from hand to hand, according to future events.

9. The abuse of this power to create trusts, is provided against by our *statute of frauds*, which declares void all trust conveyances made to defraud creditors and purchasers; and by our statute against *perpetuities*, which prohibits the limitation of any estate further than to persons in being and their immediate issue.

10. Though *trustees* (a) have the legal title to the trust property, it is not subject to their debts, nor to dower and curtesy in their hands. They cannot convey or incumber it for their own use, except in the single case where the purchaser has no notice of the trust either actual or constructive; and this cannot happen where the trust is expressed, because then, the record is constructive notice to every body. The general principle is, that the trustee can do nothing that can prejudice the interest of the beneficiary; and the reason of the above exception is, that he who appoints a trustee holds him out to the world as a trustworthy person; and if, in violation of the confidence and credit thus given him, he sell or incumber the land, for a valuable consideration, to a person having no notice of the trust, the innocent purchaser will hold it discharged of the trust; and the beneficiary must seek his redress from the trustee in whom his benefactor reposed the first confidence. But if the purchaser either paid no consideration, or had notice of the trust either actual or constructive, he puts himself in the place of the trustee, and still holds the land subject to the trust. For the protection of beneficiaries, it is an established rule that where the declared trust is to sell the land, for the payment of specified debts or legacies, the purchaser is bound to see the money applied to the specified purposes; though it is otherwise if the trust be to pay debts generally, without any specification, because then the purchaser cannot know what they are. So far as the powers and duties of the trustees are pointed out in the deed, they are bound to follow them to the letter. A power to sell land, for example, does not include a power to barter or exchange it for other land; though it may include a power to mortgage or lease it, when the intention is merely to raise money for certain purposes. But where a trust is simply created for the benefit of another, without any specific directions, the duties which chancery will enforce upon the trustee, are chiefly three; *first*, to permit the beneficiary to receive the rents and profits; *secondly*, to execute such conveyances as the beneficiary shall direct; *thirdly*, to defend the title when this is necessary. And as a general principle, the trustee can make no profit from his management of trust property. His necessary expenses are of course allowed, but he can charge nothing for his care and trouble; unless by express provision in the instrument. This severe rule is deemed necessary for the protection of the beneficiary. Trustees are accountable in chancery, for their conduct; and when the circumstances require it, they may be removed and others appointed. If there be several they must all act together, unless there be express pro-

(a) See Thompson on Trustees; Willis on Trustees; Fletcher on Estates of Trustees.

vision to the contrary; and if one improperly refuse to unite with the others, he will be compelled to resign.

11. The republican habits of our citizens being opposed to complicated family settlements, we have very few express trusts created by deed, though they occasionally occur. But trusts created by will are more frequent. The leading motive for creating a trust is to prevent property from being improvidently squandered. If a father wishes to provide with certainty for a child about to marry, and for the issue of such marriage, instead of conveying property to the child directly, he conveys it to trustees, with a declaration of his wishes; and thus while he gives the annual income to the married couple, he secures the principal to their children. In like manner, if a man wishes to guard with certainty against the prodigality of his heirs, he devises his property to trustees with specific instructions; and thus limits the power of his heirs, as far as he considers expedient. These examples will serve for illustration; and a little reflection will convince any one of the very great utility of this description of estates.

§ 153. *Implied trusts.* (a) Implied trusts, as their name imports, are those which result from the established doctrines of equity, without any declaration by the parties. They are sometimes called *resulting trusts*, and are chiefly upheld to prevent fraud. In most cases, the question whether there be an implied trust or not, depends upon circumstances connected with the consideration of real contracts. The following are the cases in which implied trusts have been most generally sustained.

1. If I purchase land, and take the title in my own name, but you pay the consideration, I become thereby a trustee for you.

2. If being already your general trustee, I purchase land in my own name with money belonging to you, I hold this land as trustee for you.

3. If I convey land to you without any consideration, you become a trustee for me.

4. If I contract with you for the purchase of real estate, by title bond, or otherwise, you thereby become a trustee for me, until the legal conveyance is made. And the same is true, if through a mistake you make me a defective conveyance. You hold the legal title in trust for me, until a good conveyance is made.

5. If I convey land to you when I have not the legal title; and afterwards acquire the legal title, I hold it in trust for you, and the same doctrine extends to my heirs taking by descent from me.

(a) *Barr v. Hatch*, 3 Ohio Rep. 529; *Bond v. Swearingen*, 1 Ohio Rep. 411; *M'Arthur v. Porter*, 1 Ohio Rep. 99; *Williams v. Roberts*, 5 Ohio Rep. 35; 2 Story on Equity, chap. 32.

6. If I convey land to you, and take no collateral security for the payment of the purchase money, you become a trustee for me, until the purchase money is paid. But it is otherwise, if I do any thing to manifest an intention not to rely upon the land for security. This is called an *equitable lien*.

7. If I, being your debtor, deposite my title deeds with you, I thereby become a trustee for you until the debt is paid. This is called an *equitable mortgage*, but it is of little consequence in this country, owing to the difficulty of affecting another claimant with notice of such deposite.

8. If I convey land to a trustee, and declare the trust as to a part, there is a resulting trust to me for the residue. If the conveyance be upon such trusts as I shall afterwards declare, and I fail to declare them, there is a resulting trust to me for the whole. And generally, if I create a trust for any particular purpose, there is a resulting trust to me as soon as that purpose is accomplished.

9. The only apparent exception to the above doctrines, is in transactions between parents and children. If I purchase land in the name of my infant child, though I take the profits during his minority, there is no resulting trust to me, but the purchase will be treated as an *advancement* to the child, because blood is a sufficient consideration in such cases, and my taking the rents and profits during his minority, only implies that I act as a guardian. And the same is true, where a husband purchases in the name of his wife. But an adult child under similar circumstances, might be treated as a trustee for his father.

10. As the evidence upon which an implied trust is set up, must be parol evidence, so parol evidence is admissible to rebut the equitable presumption of a trust, by showing either from words or actions, what was the actual intention of the parties.

11. Implied trusts are much less safe than express trusts, because there is no such thing as constructive notice with respect to them. Purchasers can only be affected by proof of actual notice of the facts which create the implied trusts. This circumstance renders the interest of him to whom the implied trust results, a very precarious one.

It only remains to be observed on the general subject of equitable estates, that the dividing line between them and legal estates, is as distinctly preserved in Ohio, as in any other place. (a) They cannot be sold on execution; nor taken advantage of in an action of ejectment. In a word, courts of law will not take notice of them; and they are left exclusively to the cognizance of chancery. The policy of keeping up this distinction of jurisdictions has been sometimes questioned. It is agreed on all hands that the *legal doctrines* alone would form a very imperfect system of land law,

(a) *Roads v. Symmes*, 1 Ohio Rep. 314; *Spencer v. Marckell*, 2 Ohio Rep. 264.

and the same is true of the *equitable doctrines* taken by themselves. But it is an important question, whether by a combination of the two into one entire and regular system, to be administered by the same tribunal, the body of land law would not be greatly improved. I merely state this for your consideration, having no time to discuss the subject. My hope is, that this is among the great reforms, towards which public sentiment is now tending.

For the sake of simplicity, the foregoing remarks have related exclusively to realty. But trusts may be created of personalty, to the same extent, and nearly on the same principles, as of realty. In fact, courts of chancery, for the purpose of giving complete effect to settlements in trust for any of the purposes aforementioned, will sometimes virtually reverse the distinctions between the two kinds of property, by treating realty as personalty, and personalty as realty. From the nature of personalty, moreover, it must be obvious, that where infants or married women are concerned, the best way to secure personalty for them, so that they may be certain of enjoying the proceeds, is to place it in the hands of trustees. We have seen that the guardian or husband has only a limited power over realty; but with regard to personalty it is nearly absolute; and therefore the motives for creating trusts of the latter, are often stronger than with respect to the former.

LECTURE XXVII.

TITLE BY OCCUPANCY.

§ 154. *What constitutes title.* (a) Having finished our view of the various kinds of estates, I am now to consider the different methods of acquiring *title* to property. According to Blackstone, there are three gradations of title; namely, first, mere possession without right; secondly, the right of possession, which may be enforced by action; thirdly, the absolute right of property, without possession or the present right of possession; and a perfect title consists in the union of these three gradations. But such refinements serve rather to perplex, than inform the mind. The truth is, that title means the same thing as *ownership*. A man may be in possession of a thing which he does not own; and he may own a thing of which he is not in possession. Possession, therefore, though it creates a presumption of ownership, and though it may ripen in time into actual ownership, is not of itself

(a) 2 Black. chap. 13, 16, 17; 2 Kent, 318.

ownership. He who is in possession, without right, is liable to be dispossessed by him who has the right; and he who has the right without possession, may acquire possession by recourse to the law. One of the elementary principles in the action of ejectment, is that the plaintiff must rely solely upon the strength of his own title, and not upon the weakness of the defendant's title. The reason is, that actual possession is *prima facie* evidence of title, and gives the occupant a right against every person who cannot show, not simply a better, but a good title. If, however, the person in possession be a mere intruder, he is not permitted to question the validity of the plaintiff's title, unless the latter were also a mere intruder; for any shadow of right in the plaintiff will be sufficient against mere possession without right. The first step, then, is for the plaintiff to exhibit a sufficient title; and until he do this, the defendant may rely simply on his possession, without further proof. But when this is done, the defendant must meet it by showing a better title either in himself or some third person. It would seem, therefore, that the perfection of title consists in the union of possession with the right of possession; for where these meet in the same person, he cannot be rightfully dispossessed. In other words, he is the lawful present owner of the property; and this is the whole of the matter. The question then is, what constitutes legal ownership of property? and this is answered by describing the ways in which ownership may be acquired, and what is evidence of such acquisition. In the acquisition of ownership, there is a marked difference between personalty and realty. I shall, however, continue to treat them in connexion, noticing the distinctions as they occur. By the English law, all the different modes of acquiring title are reduced to two; namely, by *descent* and by *purchase*. (a) In other words, he who acquires title in any other way than by descent or inheritance, is technically called a *purchaser*. Property acquired by purchase, differs from that acquired by descent, and thence denominated *ancestral*, in two important particulars, which will be more fully explained hereafter. *First, ancestral property* descends in the blood of the ancestor from whom it came; whereas, *purchased property* descends to the heirs of the last owner, without regard to the blood of any preceding ancestor. And, *secondly, ancestral property* becomes *assets* in the hands of the heir, and liable to the debts of the ancestor; whereas, *purchased property* is independent to any such liability. I am here speaking of the doctrines of the English law. In this country, or at least in this state, they have been so far altered, that ancestral property, as will be seen hereafter, includes all realty acquired from an ancestor, either by descent, devise, or deed of gift, where blood is the only consideration; and purchased property includes realty acquired in any

(a) See 2 Black. 241; 4 Kent, 373.

other way, and personalty. For this reason, I shall not notice the distinction between descent and purchase, except when discussing the law of descent; and I shall generally use the term *purchase* in its popular, and not its technical acceptance. There are, then, five ways of acquiring title to property; namely, by *occupancy*, by *marriage*, by *descent*, by *devise*, and by *purchase*. Each of these will form the subject of a distinct lecture. I shall discuss them in the above order, beginning with *occupancy*; which as far as relates to realty, is often treated of under the head of *prescription*.

§ 155. *Really acquired by occupancy.* Where property of any description is without an owner, it fairly belongs to the first person who takes possession. This is a dictate of the law of nature; and if ever there was a time when there was no such thing as exclusive individual property, occupancy may have given the first title. This too is the foundation of title by discovery. And accordingly we have seen that the whole American continent was parcelled out among the various European nations according to the priority of discovery; the occupancy of the Aborigines not being regarded as sufficient to prevent the acquisition of title by discovery. At present, however, there is so small an amount of property which has not a legal owner, that the right of acquiring property by occupancy is of very little consequence. But there are some cases in which this right is even now called into exercise. It is settled, that if soil be formed from the sea or a river, by gradual alluvion, it is the property of the adjacent owner. If an island be formed in a river, it belongs to the owner of the nearest bank; or if the middle line of the river passes through it, the portions on each side of this line belong to the respective owners of the adjacent banks. Again, with regard to the use of air, water, and light, as connected with the ownership of land, great weight is always given as we have seen, to prior occupancy. The doctrine is that he who has made the first appropriation of either of these elements for a particular use, is entitled to protection in the enjoyment of that use; but this doctrine is modified by so many considerations growing out of the increase of population and public policy, that it is difficult to lay down any precise rules on the subject. The above cases suppose the ownership to be vacant, and the right originates in the law of nature. But we have two important statutes, the effect of which is to enable persons to acquire title by occupancy, where the ownership was not vacant when the possession was taken. These are the *statute of limitations*, and the *statute of occupying claimants*.

Effect of the statute of limitations. This statute, which will be considered more particularly hereafter, provides in substance, that no action of ejectment, or any other action for the recovery of the title or possession of real estate, shall be maintained after twenty-one years from the time the cause of such action

accrued, unless the person entitled to such action, was at that time under one of the four disabilities of infancy, coverture, insanity or imprisonment; in which case, the action may be maintained, after the twenty-one years have elapsed, so that it be within ten years after the removal of such disability. The object of this statute is to discourage negligence in the assertion of claims, and prevent the raking up of dormant titles; and the consequence of its enactment is, that if any person has been in exclusive adverse possession of land for the space of twenty-one years, or the additional ten years allowed in case of disability, although he had no shadow of title at first, yet by the mere effect of occupancy for this length of time, his title has become impregnable. But this occupancy must be what is termed *adverse*; that is, one which disclaims the title of the negligent owner; for if it be in subordination thereto, the limitation of the statute does not apply. This question of *adverse possession* (a) is a question of fact for the jury under the instruction of the court. It must be exclusive of any other right; but it need not be under claim of a rightful title. And there are four classes of cases, where the possession of another is not adverse to that of the owner. 1. Where both parties claim under the same title, as by the same descent, devise, or conveyance, the possession of the one is not, of itself, adverse to the other, but requires some positive act or declaration to make it so. 2. Where the possession of one party is consistent with the title of the other, it is not, of itself, adverse, but requires other circumstances to make it so; as where a grantor remains in possession after conveyance, or where the beneficiary is in possession instead of the trustee, or the mortgagor after executing the mortgage, in all these cases the presumption is against adverse possession. 3. Where the other party has never, in contemplation of law been out of possession, the actual possession is not of itself adverse. Thus a tenant for years, at will, or at sufferance, does not, unless by some positive demonstration, hold adversely to his landlord; and the possession of one tenant in common, unless there be an actual ouster, is the possession of all. 4. Where the possessor has once acknowledged the title of the other party, as by offering to purchase, paying rent, requesting a lease, and the like, the possession is not adverse; nor can it be rendered so by a subsequent denial; and this doctrine of acknowledgment extends even to the predecessors of him in possession. With these explanations, it may be laid down as a general rule, that where neither party can show any other than a possessory title, the prior possession, however short, is the better one, unless the defendant has been in possession so long as to be

(a) Adams on Ejectment, 50—57; Abram v. Will, 6 Ohio, 164; Payne v. Skinner, 8 Ohio, 298; Wallace v. Miner, 6 Ohio, 366, and 7 Ohio, 249; Ludlow v. M'Bride, 3 Ohio, 240; Ludlow v. Barr, 3 Ohio, 388; Starke v. Smith, 5 Ohio, 455.

protected by the statute of limitations; but against a regular paper title no possession short of the statute will avail, this being the term fixed for the presumption of title; and then the presumption is so conclusive, that a person out of possession may recover upon a prior possession, for the period of the statute, against a regular paper title with possession for a less period. But it is held that possession of government land before a patent has been issued, even for twenty-five years, is not protected by the statute, because the statute does not run against the government.

Effect of the statute of occupying claimants. (a) This statute is intended to benefit those persons only, who have taken possession of land supposing they had an undoubted title; and in this confidence have made valuable improvements, which, by the common law they would utterly lose, on being evicted by a superior title; accordingly those persons called *squatters*, that is mere intruders, occupying without claim of title, are not within its provisions. The act enumerates five classes of occupants, whom it protects: namely; *first*, those who can show a plain and connected title either in law or equity, derived from the records of some public office; *secondly*, those who claim by descent, devise, deed or title bond, under the foregoing; *thirdly*, those who claim under a sale on execution against either of the foregoing; *fourthly*, those who claim under a regular tax sale; *fifthly*, those who claim under a regular sale by executors, administrators, guardians, or other persons, by order of court. If a person of either of these descriptions has occupied land without fraud or collusion, he cannot be evicted by any claimant having a superior title, until he has been fully paid for all lasting and valuable improvements, made previous to the commencement of the suit, unless he refuse to pay the claimant the value of the land without the improvements. The act proceeds upon the plain equitable ground that the improvements honestly made ought in fairness to belong to the occupant, and the land itself to the claimant. But as they cannot be separated and one must take both, the party taking both must pay the other the fair value of his share. The mode of ascertaining the respective claims is as follows: The title is first tried by the regular action of ejectment, and judgment goes against the occupant, who thereupon claims the benefit of this act. A jury is then empanelled to ascertain, *first*, the naked value of the land at the time of the judgment; *secondly*, the value of improvements made before suit; *thirdly*, the rents and profits; and *fourthly*, the damages done to the land by any species of waste. These rents and profits, together with damages, are of course to be subtracted from the

(a) *Hunter's Lessee v. M'Mahan*, 5 Ohio, 132; *Seller's Lessee v. Corwin*, 5 Ohio, 409; *Shaler's Lessee v. Magin*, 2 Ohio, 236; *Greene v. Biddle*, 8 Wheat. 1.

value of the improvements, or *vice versa*. If the balance be in favor of the claimant, then, as nothing is due the occupant, the claimant has judgment for the land and for such balance. But if the balance be in favor of the occupant, then the claimant has his option, either to take the assessed value of the land and release to the occupant, or pay the assessed balance for the improvements, and take the land. It would be difficult to conceive of a set of provisions more perfectly equitable and just. The principle of the common law, which gave all improvements in the nature of fixtures, to the successful claimant, was always productive of hardship, but peculiarly so, in a new country, where the settlers are proverbially improvident respecting the security of their title. The present statute was enacted in 1831, and differs considerably from that of 1820. Under the latter, the valuation, instead of being made by a jury of twelve, as at present, was made by three commissioners; and it was objected that on this account the act was unconstitutional, being in contravention of the provision that the right of trial by jury should be inviolate; but the court held that even in this form the law was constitutional, no particular number being necessary to constitute a jury. At all events, the present statute silences this objection. It has also been decided that under this act, it makes no difference whether the improvements were made before or after the occupant's supposed title commenced. Neither the words nor the reason of the act restrict its operation to subsequent improvements. It is sufficient, if at the time of the action he can show such a supposed good title as the act requires. The words of the act are, that the occupant "shall be paid the value of all lasting and valuable improvements, made on said land by such occupying claimant," or those under whom he claims, prior to the commencement of the suit.

§ 156. *Personalty acquired by occupancy.* (a) It is more easy to acquire personalty by occupancy, than realty, on account of possession being stronger evidence of ownership. It is a general rule, as will be shown hereafter, that the ownership of realty must be evidenced not only by writing, but by record; whereas personalty does not usually require even written evidence of ownership. The consequence is that personalty is more frequently acquired by occupancy, than realty. The most common instances are as follows. 1. The finder of *things lost*, is entitled to them, unless the original owner appears to claim them; and still more, if there be no such owner. We have a statute respecting *stray animals* and *boats adrift*, requiring the finders to have the things found appraised, and to advertise the fact of finding; and if the owner does not appear within one year and pay charges, the property vests in the finder. 2. The captor of

(a) 2 Kent, lec. 36; 2 Black. chap. 26.

wild animals, including all, on land or water, which have not been tamed or domesticated, is entitled to them, provided that in taking them, he does not trespass on the rights of others. 3. *Emblements*, which have been already described, are acquired by occupancy. 4. The increase of value by *accession*, is referred to this head. The general rule is that if a thing in the possession of another, receive an accession of quantity or value, by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, or the application of mechanical labor and skill, such increase belongs to the possessor. 5. The acquisition of value by invention, discovery or authorship, in art, science, or literature, comes likewise under this head. But enough has been said on this topic, when speaking of *copy rights* and *patent rights*. 6. In case of the *confusion* of goods, the rule is, that if goods belonging to different persons be mixed or confounded together by mutual consent, the owners have a proportional interest therein; but if done by one without consent of the other, the latter has the whole. 7. The *capture* of an enemy's goods in time of war, is referred to the head of occupancy; but a discussion of this topic would occupy too much space. 8. To this head may also be referred the subject of *good-will*, (*a*) by which is meant the advantage accruing to any trade or business from an established custom. It is partly dependent upon mere locality, and partly upon personal reputation. The presumption is, that customers will continue to deal, where they have been in the habit of dealing; all other things being equal; and this renders an old stand more valuable than a new one, independently of the reputation of those who conduct the business. Thus far good-will is merely local; all beyond is personal. Both law and equity regard good-will as a valuable interest, capable of being bought and sold; but it is obviously difficult to measure its value, as we measure that of actual property; and therefore the parties interested must expressly fix a value by agreement, if they would have it recognized by courts. Questions of this sort generally arise upon a relinquishment of business. If the owner of a shop sells it, the local good-will passes of course to the purchaser without specific mention; but the personal good-will remains with the person, unless the contrary be stipulated; and even then he is not precluded from prosecuting the same kind of business at another stand, because contracts in restraint of trade are against public policy. Attempts have been made to draw a distinction between an agreement not to pursue the same business, and not to pursue the same kind of business; but it is too shadowy to be available. When a partner leaves or enters a firm, good-will is never taken into account, unless by express provision in the contract. So when a partner dies, the

(a) See Collyer on Partnership, 80; Smith on Commercial Law, 109.

survivor succeeds to the entire good-will, without liability to account, unless the contrary was expressly stipulated. When, however, a court of equity decrees a sale of an entire stock in business, care is taken so to regulate the sale as to bring an increased price on account of the good-will, if this be practicable.

LECTURE XXVIII.

TITLE BY MARRIAGE.

§ 157. *Dower.* (a) The nature of marriage has already been described. One of the consequences of marriage, after the death of one of the parties, is to give the other a life estate in a part or the whole of the realty owned by the deceased. If the husband dies, the title thus acquired by the wife, is called her *dower*. If the wife dies, the title thus acquired by the husband is called his *curtesy*. These have been already mentioned under the head of estates for life, their general incidents being the same as belong to all life estates; but in this connection they require a more particular consideration. By *dower* is meant the interest which the wife has in the realty of her husband, after his death. At common law there were several kinds of dower, and a full discussion of the subject involved a variety of nice distinctions; but in this country, or at least in this state, there is but one kind of dower, which is provided for by statute; and thus we have another instance of simplification in the law of realty. Referring for details to the books, I shall consider who may be endowed; of what; how barred; and how assigned.

Who may be endowed. The words of the statute are, "the widow of any person dying." She must have been the *actual wife* of the party at the time of his death, unless divorced, for his aggression. (b) Nor may she at the time have been living with an adulterer, though the mere fact of former adultery, if her husband has afterwards been reconciled, is not an objection to dower. Nor is the fact of her being an *alien*; since in this state aliens have the same capacities in regard to real estate, as citizens. There is nothing in our statute of dower, or in that which prescribes the formalities of marriage, to determine whether a *legal* marriage according to the statute is necessary; but I presume the

(a) See 2 Black. 128; 4 Kent, 35—72; 1 Cruise, 127; Clancy on Husband and Wife, and Park on Dower.

(b) And a divorce for her own aggression granted in another state, will not bar dower in this state. *Mansfield v. McIntire*, 10 Ohio, 27.

general rule applies in this case; which is, that in the absence of positive testimony of a legal marriage, proof of reputation and cohabitation as husband and wife, will be received as *prima facie* evidence of a legal marriage.

Of what. The words of our statute are, "one full and equal third part of all the lands, tenements and real estate of which her husband was seised, as an estate of inheritance, at any time during the coverture; and of one third part of all the right, title or interest, which her husband, at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim." The common law did not give dower in *equitable* estates; but the above words are understood to include all equitable estates; and thus a very unreasonable doctrine of the common law, which denied dower, while it allowed curtesy, in equitable estates, is here abolished. The term "*lease*," used in the statute probably has no meaning. For the interest of a lessee for life terminates at his death; and that of a lessee for years, though renewable for ever, is a mere chattel interest except in certain cases pointed out by another statute, of which dower is not one. The effect of this statute therefore is simply to extend the right of dower to equitable estates in fee. (a) You will, however, note this distinction, that dower in *legal* estates extends to all land owned at any time during the coverture; but in *equitable* estates, only to land owned at the time of the decease. The statute does not say that the right thus acquired by the widow shall be for her life only: but this is implied in the very term dower. The widow is likewise entitled to remain one year in the mansion-house free from expense, unless her dower is sooner assigned. As to the *seisin* of the husband, we have already seen that there is no livery of seisin in Ohio, and that actual entry is never necessary to constitute a seisin. The word here means nothing more than ownership; and there is no distinction between seisin *in law*, and seisin *in deed*. But there are several cases in which the mere legal seisin or ownership will not give a right of dower. (b) Thus a trustee, without beneficial interest, has not such an ownership as will create the right of dower; nor a mortgagee, who does not obtain possession either by ejectment or foreclosure; nor a purchaser, who at the same time that he obtains title, mortgages the land back for the purchase money; nor a purchaser against whom the vendor has an equitable lien for the purchase money; nor a partner, where the lands have been purchased with partnership funds, under articles stipulating that the

(a) But see the case of *Loring v. Melendy*, 11 Ohio, 355, where the court hold permanent leasehold estates to be lands for all purposes.

(b) *Derush v. Brown*, 8 Ohio, 412; *Greene v. Greene*, 1 Ohio, 535; *Sumner v. Hampson*, 8 Ohio, 328; *Smiley v. Wright*, 2 Ohio, 506; *McArthur v. Porter*, 1 Ohio, 99; *Gwynne v. Cincinnati*, 3 Ohio, 24; *Allen v. McCoy*, 8 Ohio, 418.

whole property should be sold to pay the debts, and the firm is insolvent; nor the heir upon whom lands descend, charged with the debts of the ancestor: for in all these cases, there is a claim superior to dower, existing in some other person. Nor can there be dower in lands owned for public or private burial grounds; nor in lands dedicated by the husband to public uses, as for a street, common, or market place; because in these cases the use is incompatible with dower. But there may be dower in wild lands, though while they remain such, it is of no value. With these qualifications, this right of dower is of so transcendent a character, that the husband cannot by any separate act, as by alienating the land, or incumbering it with debts, deprive the widow of her right. Moreover, the statute expressly provides, that if he should give up the lands by collusion or fraud, or lose them by default, the widow may still claim her dower; so that in this respect he has no more power, than he has over the separate lands of his wife.

How dower is barred. There are several ways in which a widow may be deprived of dower, when the ownership of the husband would have been sufficient. 1. *By jointure.* The statute provides that if any estate be conveyed to a woman as a jointure, in lieu of dower, to take effect immediately after the death of the husband, and to continue during her life, this will bar her dower; but here her free consent is presupposed; and therefore if the jointure was made before she was of age, or after the marriage, she has her option on becoming a widow, to take the jointure or her dower; and if she be legally evicted from any part of her jointure, she may recover an equal amount as dower; but on the other hand, should a conveyance intended to be in lieu of dower, from any legal defect fail to be a bar, and the widow in consequence demand her dower, such conveyance to her shall be void. 2. *By devise in lieu of dower.* By our statute of wills, if a husband by his will make any provision for his widow, it will be taken to be in lieu of dower, unless it plainly appears to have been his intention that such provision should be in addition to dower; and she has six months within which to make known her election to the court, whether she will take the legacy or dower; which election must be entered on the minutes of the court; and the election of either bars the other. If she makes no election, the law considers her as relinquishing her legacy, and gives her dower; and in one case, (a) where the legacy was not specified to be in lieu of dower, but the widow made an agreement with the heir, reciting that it was in lieu of dower, and stipulating to accept certain things in satisfaction of the devise, the court held this agreement to be a bar. 3. *By joining her hus-*

(a) Shotwell v. Sedam, 3 Ohio, 5.

band in a deed. (a) Our statute provides that a woman may bar herself of dower, by joining with her husband in a deed or mortgage, she being eighteen, in the same manner as if she were conveying her separate estate. But in this case, to avoid the possibility of deception or coercion, the wife must be examined separately, by the person taking the acknowledgment, who must explain the contents of the deed; and she must declare that she executed the deed of her own free will, and without fear, and that she is still satisfied therewith. All these things must be stated in the certificate. 4. *By fraud in the wife.* (b) Our court has decided, that where a widow agreed with the administrator that the land should be sold free from dower, and was present when the land was so put up for sale, and did not contradict it, and the land in consequence brought a higher price, she is thereby barred. 5. *By her misbehavior.* Our statute provides that if a woman be divorced for her own aggression, or if she voluntarily leave her husband and live with an adulterer, without a subsequent return and reconciliation, she thereby forfeits her right of dower; and if she voluntarily commit or suffer any *waste*, she thereby forfeits that part of the dower estate, in which such waste was committed.

How dower is assigned. (c) Dower may be assigned in two ways, *voluntarily* or *by petition*. When the land is not incumbered, the heir or other person interested, may assign the widow her dower, "by writing under his hand and seal," and if she

(a) See *Brown v. Faran*, 3 Ohio, 140; *Connell v. Connell*, 6 Ohio, 353; *Hubbell v. Broadwell*, 8 Ohio, 120. The result of these cases, is that it is sufficient if the certificate state the substance without the exact language of the statute. With respect to joining in a mortgage, the wife thereby only bars herself with respect to the mortgagee and his representatives or assigns. If the debt be paid without a sale of the land, dower is restored; if by sale of part only, dower is restored in the residue; but if the land be sold to pay the debt, it makes no difference whether it be by the administrator of the husband, or under a decree; for dower is equally barred. *St. Clair v. Morris*, 9 Ohio, 15. Curative statutes enacted for the purpose of healing defective acknowledgments, are unconstitutional and void, as respects married women. *Good v. Zercher*, 12 Ohio, 364.

(b) See *Smiley v. Wright*, 2 Ohio, 506. But in *McFarland v. Febiger*, 7 Ohio, part 1, 194, it was held that where a wife signed and acknowledged a deed with her husband, knowing that it was defective in the granting clause, and that the purchaser was thereby deceived, this will not bar her dower; because the fraud was committed while she was under coverture.

(c) By the statute of 1843, the widow, in addition to the lands set off to her, is entitled to one third of the net profits of the lands subject to dower, accruing between the time of filing her petition, and the time of assigning dower, to be ascertained by the commissioners; but if the lands had been aliened by her husband, the commissioners are to exclude from their estimate all permanent improvements subsequently made. It had previously been decided that dower is to be estimated according to the value of the land at the time of assignment, excluding all increase resulting from improvements made after alienation, but including all other increase. *Duneth v. Bank U. S.*, 6 Ohio, 76; *Allen v. McCoy*, 8 Ohio, 418. But the right to dower accrues at the death of the husband, and is barred in twenty-one years from that time. *Tuttle v. Wilson*, 10 Ohio, 24.

accepts the assignment, it is conclusive. It would seem from the above words, that a deed of assignment of dower need not be attested, and acknowledged, like other deeds. But we have no judicial construction of those words. If dower be not assigned voluntarily as above, the widow must file her petition against the heirs or other persons interested, setting forth all the facts necessary to sustain her right and enable the court to act; and if the court decree in her favor, the sheriff is ordered to have the dower set off by three judicious men, and possession given to the widow. We have no action at law to recover dower, unless ejectment would lie in the first instance, which, under the above provision, is improbable. After assignment thus made, there is no doubt ejectment would lie to recover possession. In case the heirs should file a bill for partition before the assignment of dower, the persons directed to make partition, must first set off the dower; and in like manner when land is directed to be sold by administrators, it is the first duty of the appraisers to set off the dower. Where the property is of such a nature that it cannot well be divided, dower is assigned in a special manner, as one third of the rents and profits, to be ascertained by the above persons.

From this view it will be seen that our law of dower differs from the common law, in there being but one kind of dower, instead of four or five; in comprehending equitable as well as legal estates; and in being cognizable in chancery, and not at law, in the first instance. And on the whole, it is believed to be inferior to no system in the great points of simplicity and liberality. The subject of personalty acquired by the wife, has already been considered in the lecture on husband and wife. We there saw that with respect to personalty, the advantage is altogether on the side of the husband. The wife not only acquires no interest in his personalty, but loses the control of her own personalty. Except the right to a mere support, narrowed down to the measure of necessities, she acquires no interest in personalty by marriage, until her husband's death; in which event, if there be no debts and no children, she has all; if there be children, after payment of the debts, she has half the first four hundred dollars, and one third of the residue.

§ 158. *Curtesy.* (a) This estate is recognized both by our legislature and our courts, but in no respect modified. It remains therefore as at common law; and I shall consider its general nature; but of the origin of the term *curtesy*, I shall not take up your time with giving an account. An estate by curtesy is where a man marries a woman seised of real estate in fee, and has by her issue born alive. In this case, on the death of his wife, he is entitled to hold such real estate for life as tenant by curtesy. Thus curtesy differs from dower in two important respects; first,

(a) 2 Black, 126; 4 Kent, 27—35; 1 Cruise, 105; Lowry v. Steele, 4 Ohio, 170.

it extends to all the real estate of the wife, instead of a third part; and secondly, it depends upon having issue born alive, which was not the case in dower. As to the *marriage*, it must be the same as in case of dower; that is, a marriage consummated pursuant to the statute, and actually existing at the death of the wife: for if there has been a divorce for the husband's aggression, our statute provides that the wife shall be restored to all her real estate; which expressly takes away his curtesy; but if the divorce be for the aggression of the wife, the statute provides that she may be restored to the whole or a part of her real estate, as may seem just. What is meant by this last vague provision, is somewhat doubtful; but I presume it only means to allow the husband to retain possession, after the divorce, during the life of the wife, as a kind of punishment to her; and not to give him an estate by curtesy; for at her death the right of her heirs attaches, which would not be affected by this order of court. We have seen that by express provision, the adultery of the wife, without subsequent reconciliation, cuts off her dower. As to the *seisin* required in the wife, nearly the same remarks apply as in case of dower. She must have a beneficial ownership in fee; but she need not have entered upon the land, because here entry is never necessary to perfect title. Nor need she be in actual possession; for where a woman before marriage created a term of years in trust for herself during the coverture, she was still considered by our court as having such a *seisin* as entitled her husband to curtesy; and it makes no difference at what time of the coverture the *seisin* commenced, so that it continues till her death. Nor is curtesy confined to the *legal* estate of the wife; as I have before mentioned, it has long been held to extend to her *equitable* interest. The only exception is, where the trust is expressly declared to be for her sole and separate use, in such a manner as to negative the idea of curtesy in the husband. As to the necessity of *issue* born alive and capable of inheriting, which is not the case in respect to dower, whatever may have been the origin of the doctrine, it seems now to be a purely arbitrary and technical requisition; for if the infant should live but for one instant after birth, so as to prove that it was born alive, this is sufficient; the right to curtesy from that moment attaches, and becomes perfect on the death of the wife. Were we to look to the reason of the thing alone, we should say that there is more reason why a husband should have curtesy when there had been no issue, than if there were issue surviving; and just as much reason, as when there were issue born which did not survive. However such is the law. We have seen that dower may be barred or forfeited in a variety of ways. Not so with curtesy. No conduct of the husband, however wrong, which does not result in divorce, deprives him of his right. Nor does he incur a forfeiture for *waste*, as in case of dower, because there is no express provision to this effect. He

only renders himself liable in damages. There is of course no occasion for an assignment of curtesy, as there is of dower, because the husband takes the whole.

We have already seen, that the husband obtains control of all his wife's personalty. If choses in action be not already reduced to possession, he may collect and dispose of them. In a word, therefore, by marriage, the husband acquires a right to all the wife's personalty, unless previously settled in trust for her separate use; and the law gives her no power to prevent his wasting it.

LECTURE XXIX.

TITLE BY DESCENT. (a)

§ 159. *Preliminary explanations.* When the owner of land dies without making a disposition thereof, the law makes it for him. Leaving no will, *testamentum*, he is said to die *intestate*, and in legal phrase is called *the intestate*. The persons to whom the law gives his property are called his *heirs*, and he their *ancestor*; and the title by which the heirs take the property is called *title by inheritance, or descent*. But before the property of the ancestor can avail his heirs, there are certain prior claims to be satisfied. In the first place, the rights of *dower* and *curtesy*, if either exist, take precedence of heirship, and cannot be affected by the law of descent. And in the next place, the claims of creditors must all be satisfied. (b) When these prior claims are satisfied, the heirs succeed by descent to the residue; or rather, at the instant of the ancestor's death, his property vests in his heirs incumbered by these prior claims. It was formerly held that an *actual entry* by the heir was necessary to perfect his title; but for the same reason that actual entry is not necessary under a deed in this state, I presume it is not necessary for the heir. It is the general spirit of our laws to dispense with these empty ceremonies; though I am not aware that this particular point has been decided. The rules of descent vary considerably in the different states, but all the states agree in departing from the English law so far as to promote equality among the heirs. For example, the two great characteristics of the English *canons of descent*, namely, *primogeniture*, or a preference of the eldest son over all

(a) See 2 Black. chap. 14, 29; 4 Kent, lec. 65; 2 Hilliard, chap. 22; 3 Cruise, 368; Reeve on Descents; Chitty on Descents.

(b) Piatt v. St. Clair's Heirs, 6 Ohio, 227; Ramsdall v. Craighill, 9 Ohio, 197.

the other children, and a *preference of males over females*, are probably found no where in the United States. But before describing our rules of descent, some preliminary explanations will be necessary.

1. I have already had occasion to observe that realty alone is strictly *inheritable*. Technically speaking, personalty does not descend in any case to the heirs. On the death of the owner, it vests in the executor or administrator; and is by him distributed in the manner heretofore pointed out. Those who take the residue, after payment of debts, are said to take, not as heirs, but as *distributees*. They are called *personal representatives*, to distinguish them from heirs who are called *real representatives*. Nevertheless, I shall, in this lecture, include succession to both realty and personalty; for, with the exception of the widow's claims, (a) personalty passes in this state to the same persons, as non-ancestral realty. The statute of descent and distribution, now in force here, was enacted in 1831, and amended in 1835. It prescribes some of the fundamental rules of inheritance; but yet leaves many questions to be settled by authority and analogy, respecting which, I would refer you for particulars to the books before indicated. The same statute provides both for the descent and distribution of estates; that is for the disposition both of realty and personalty. With regard to the property of non-residents, the general rule is, that realty descends according to the law of the place where it is situated; that is, realty in this state, descends according to the law of this state; whereas personalty is distributed according to the law of the place where the deceased resides.

2. Our statute says that real estate shall descend "*in parcenary*;" but we have already seen that in this state there is no distinction between estates in parcenary and estates in common. Of course the phrase means nothing more, than that the heirs, until partition is made, are tenants in common.

3. Our statute says that when heirs of a certain description are all in the same degree, they shall take "*per capita*;" otherwise, "*per stirpes*." The meaning is this: heirs take *per capita*, or *by the head*, when each individual has the same share; as, for example, if there be five children, or five grand-children, or five brothers and sisters all living, and none of any other degree, each takes one fifth. But heirs take *per stirpes*, or *by representation*, when the children of a deceased heir take only their deceased parent's share; as for example, if there had been five heirs in the same degree, but one was dead, the children of the deceased would together take only one fifth.

(a) We have elsewhere seen that if there be no debts, and no children, the widow takes all the personalty; if children, she takes one half of the first four hundred dollars, and one third of the residue.

4. Our statute makes a distinction between the cases where realty came to the intestate "*by descent, devise, or deed of gift, from any ancestor,*" and where it came to him in any other way. This distinction has been already noticed. For the sake of convenience, I express it by calling the first property *ancestral*, and the second *non-ancestral*. By *ancestral property* then, is meant, that realty which came to the intestate from his ancestor, *in consideration of blood*, and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor, or by deed of actual gift from a living one. And by *non-ancestral property* is meant, all personalty, and that realty which came to the intestate in any other way, whether by purchase from his ancestor or from a stranger, for an equivalent paid, or by actual gift from a stranger, so that the consideration of blood is out of the question; for this makes the sole distinction.

5. We have already seen that *aliens* have here the same rights and privileges in regard to real estate as citizens. The statute of descent expressly provides that it shall be no objection to heirship that it is derived through an alien ancestor; from which it follows that aliens may not only inherit, but transmit inheritance as well as citizens. And the statute further provides, in the same spirit of liberality, that alien heirs, residing out of the state may have ten years within which to appear and assert their claims. Our statute is equally liberal on the subject of *legitimacy*. *Bastards* are made capable of inheriting or transmitting inheritance *on the part of their mother*, (a) who can always be certainly known, but not on the part of their father, for want of such certainty. And if a man have children by a woman, and afterwards marry her and recognize such children, they thereby become legitimate and capable of inheriting. Again, where a marriage is deemed null in law, the issue of such marriage are still held legitimate and capable of inheriting. By these humane provisions, children are exempted as far as possible from punishment for the faults of their parents, and parents have a motive to atone for their faults by rendering their children legitimate. It hardly need be added that *posthumous* children, may inherit, as well as those born before the death of the father. This is a principle of general law. It is only necessary that the birth occur within a possible time after the father's death. (b) There was an important maxim of

(a) Where a bastard inherited from his mother, survived her, and died intestate, leaving no issue, but leaving a widow, held that the land should go to the widow, and not to the heirs of the mother. *Little's Lessee v. Lake*, 8 Ohio, 289. And see *Stevenson v. Sullivan*, 5 Wheat. 207.

(b) In 1 Beck's Med. Jur. 449, the ordinary term of gestation is said to be ten lunar months or forty weeks, equal to nine calendar months and a week. In Chitty's Med. Jur. 409, it is said to be thirty-nine weeks and one day, or nine calendar months. This alone is sufficient to show that there is no exact and uniform period. In fact, although the ordinary period is about nine calendar months, it may fall short two months, and it may overrun nearly one month, as agreed by both these authors.

the English law, which we have abolished, namely, that no one could be an ancestor, so as to transmit inheritance, unless he had been *actually seised* of the land; for the heir must be heir to the person last actually seised; or, as it was expressed in Latin, *non jus sed seisinam facit stipitem*; not the right to the land, but the seisin makes the stock. It is unnecessary to point out the consequences of this technical doctrine, because we do not recognize it. For besides that we have no such thing as technical seisin, as has been repeatedly observed, the very words of the statute extend the rules of descent to the heirs "of any person who shall die intestate having *title or right* to any real estate of inheritance." (a) These words include whatever amounts to an ownership in fee, whether legal or equitable, without any reference to the question of actual seisin.

6. There are two modes of computing the degrees of kindred, namely, by the *canon law*, and by the *civil law*. In England, the former is adopted; in this country, the latter. (b) The difference is this; the canon law begins at the common ancestor, and reckons downward, and in whatever degree the two persons whose relationship is sought, or the most remote of them is distant from the common ancestor, that is the degree of relationship; whereas the civil law, which we follow, begins with the intestate, ascends to the common ancestor, and then descends to the person in question, reckoning a degree for each person, in both the ascending and descending lines. With these explanations, I proceed to state and illustrate the rules of descent, as prescribed in our statute.

§ 160. *Rule for lineal descendants.* First of all, property descends lineally to children and their issue, *per capita*, where all are in the same degree, and *per stirpes*, where they are not. This rule operates wherever there are children or children's issue, whether the property be ancestral or non-ancestral, to the exclusion of all collateral relations. If all the living heirs are children, all grand-children, and so on, they take equal shares; but if any one of the heirs be dead, leaving children, these children together take their parents' share by representation. The only exception to the first rule, is when any of the children of the intestate or their issue, have received from him in his lifetime any real estate by way of *advancement*. (c) Property is said to be given by way of advancement, when it is given with an express view to a portion or settlement for life; and not when it is given for maintenance or education. In case of advancement, our statute provides, that if it be equal to or greater than the other shares, it shall pass for a full share; and if less, it shall be taken as part of a share, the value being estimated at the time it was made.

(a) *Bond's Lessee v. Swearingen*, 1 Ohio, 395; *Rice v. White*, 8 Ohio, 216; *Avery's Lessee v. Dufrees*, 9 Ohio, 145.

(b) 2 Black. 206; 4 Kent, 412.

(c) 4 Kent, 418.

§ 161. *Rule for brothers and sisters.* If there be no lineal descendants, property descends collaterally to the brothers and sisters, and their issue, *per capita*, where all are in the same degree; and *per stirpes*, where they are not. The effect of this rule is to prefer brothers and sisters, and their lineal descendants to all other collateral kindred. But under this rule, there is a difference when the property is ancestral, and when not. If the property is ancestral, it passes to brothers and sisters of the whole and half blood indiscriminately, provided they are of the blood of the intestate's ancestor. But if non-ancestral, it passes to the brothers and sisters, and their issue of the *whole blood*, if there be such; if not, to those of the *half blood*. (a) Suppose, for example, the intestate's father had two or more wives, and children by each; in which case the intestate would have brothers and sisters, both of the whole and half blood. Now if the property were ancestral, and came from the intestate's father, it would pass to his brothers and sisters, both of the whole and half blood, because both would equally be of the blood of the ancestor from whom the estate came, that is, of the intestate's father; but if the property were non-ancestral, and came from the intestate's mother, then the children of his father by his other wife or wives, being of half blood with the intestate, and not of the blood of the ancestor from whom the estate came, could not take at all, except in a case to be mentioned under the third rule. If, however, the property in this case were non-ancestral, it would pass first to the brothers and sisters of the whole blood, and next to those of the half blood. The reason of the above distinction is this. The law endeavors, as far as is possible by fixed rules, to effectuate what would probably have been the wishes of the intestate. For this purpose, it recurs to the universal feeling of attachment to those of the same blood, and endeavors to keep property within that limit. Under the first rule no distinction was necessary. The lineal descendants of the intestate necessarily partake through him of the blood of all his ancestors. But under the second rule, brothers and sisters of the half blood, share the blood of only half the intestate's ancestors. One parent is common to both, the other not. If the property came to the intestate through the common parent, then it cannot pass out of the blood of the ancestor by passing to both alike, and accordingly the law ordains that it shall so pass. But if the property came from or through the ancestor not common to both, by passing to the half blood, it would pass out of the blood of the ancestor; this accordingly the law will not allow, unless in a contingency provided for under the third rule.

§ 162. *Rule for other specified relatives.* If there be no heirs who can take under the preceding rules, ancestral property passes

(a) And it makes no difference, in such case, if the brother of the half blood should be born after the death of the intestate. *Dunn v. Evans*, 7 Ohio, part 1, 169.

to the ancestor from whom it came, if he be living; if not, to his children or their issue, if any; if not, to his brothers and sisters and their issue, if there be such; if not, to the brothers and sisters of the half blood of the intestate not of the blood of the ancestor, if there be such; if not, to the next of kin of the intestate, being of the blood of the ancestor. And non-ancestral property including personalty, ascends to the father if living; if not, to the mother if living; if not, it passes to the next of kin. This rule, it will be seen, provides for the contingency before mentioned, where ancestral property, when neither the ancestor himself, nor any of his children, or brothers or sisters, or their issue are living, passes out of the blood of the ancestor, by passing to the half blood of the intestate. The last part of this rule, which allows non-ancestral property to ascend to the parents, is an innovation upon the English law, under which property could never lineally ascend. Under this rule, the doctrine of representation terminates. It extends only to the lineal descendants, and the brothers and sisters of the intestate or the ancestor, as the case may be, and their descendants. This is by the express words of the statute, which confine the taking *per stirpes*, to "any of the aforementioned children, brothers, sisters, or their legal representatives," which words include not only the brothers and sisters of the intestate, but also the brothers and sisters of the ancestor from whom the estate came, because in the statute these have been mentioned before. Beyond these, therefore, the next of kin who are living, take the whole, without regard to the representatives of any in the same degree, who are dead.

§ 163. *Rule for the next of kin.* The question now arises, *who are the next of kin.* The statute says, that if the specified persons cannot take, the next of kin shall. But who these are, it leaves to the common law to determine; and, as I have already mentioned, the common law of this country has adopted the rule of the civil law. By this rule, the first degree of kindred embraces parents and children; the second, brothers and sisters, and grand-parents and grand-children; the third, great-grand-parents, great-grand-children, uncles and aunts, and nephews and neices, and so on, to the more remote degrees. But among these, the lineal descendants, the brothers and sisters and their descendants, the parents, and the brothers and sisters of the ancestor from whom the estate came, and their descendants, have been specifically provided for in the statute. Accordingly, we have to seek for the next of kin among grand-parents, great-grand-parents, uncles and aunts, cousins, and so on, without regard to the doctrine of representation, but having regard to the distinction between property ancestral and non-ancestral; for if the property be ancestral, the next of kin must be of the blood of the ancestor; if not, of the blood of the intestate. I shall point out some of those

whom the law would probably select. I say *probably*, because we have had no decisions on the subject. 1. Parents were the last persons expressly provided for. Next come the grand-parents, who being in the second degree, would be preferred to the uncles and aunts of the third degree. But though both grand-parents are equally near of kin, and though in general, there is no distinction of sex, yet as the father has been expressly pointed out to take before the mother, by analogy, the grand-father will take before the grand-mother, unless the estate came from or through her; in other words, they do not take together, as tenants in common. 2. Next come the uncles and aunts of the intestate. If the property was ancestral, it will pass to the brothers and sisters of that parent from whom the estate came, under the third rule; so that our present inquiry is confined to the case where the property is non-ancestral. In this case, it will probably pass to the brothers and sisters of the father, in preference to those of the mother, from the analogy before mentioned, of fathers being preferred to mothers in the statute. 3. Great-grand-parents would come next. Indeed they are in the same degree as uncles and aunts, that is the third. But they would probably be postponed to the latter, because the law dislikes lineal ascent, when it can be avoided, a prejudice which the statute exemplifies, by preferring more remote heirs to parents. However, this question, from the nature of things, can seldom arise. 4. Cousins would probably come next; for though grand-uncles and aunts are likewise in the fourth degree, yet from the preference to *descent* before *ascent*, the estate will sooner descend to the children of uncles and aunts, than ascend to the brothers and sisters of grand-parents, unless the estate came from them; but as property rarely passes to degrees so remote, it would be unprofitable to pursue this inquiry further. 5. If there be no one of kin, real estate passes to the husband or wife of the intestate, if such there be; if not, it *escheats* to the state. It may seem singular, considering the closeness of the connexion, that the husband or wife should be the most remote of all the heirs; and that they are only permitted to inherit to each other, when otherwise the property would escheat to the state; and in fact I cannot conceive of a single argument in favor of such a doctrine; but such is the law, and it is not my province to vindicate it. The propriety of the state taking property by escheat, when it has no other owner, is too obvious to need comment.

A brief recapitulation will serve to impress these rules the better on your memory. When heirs take by descent, they take as tenants in common. Posthumous children may inherit. Bastards can inherit and transmit inheritance from the mother. Children born before marriage and acknowledged after, and children born during a marriage void in law, are legitimate, and may inherit. Aliens can inherit and transmit inheritance. Actual

seisin of the ancestor is not necessary. Males are not preferred to females, except in case of husband and wife. Descent *per capita* is where all the heirs in the same degree take alike. Descent *per stirpes*, is where the heirs are of different degrees; and the children of those dead, take together the shares of their deceased parents. It extends no further than to children and their issue, brothers and sisters and their issue, and the brothers and sisters of the ancestor from whom the estate came, and their issue. Ancestral property is realty which came to the intestate by descent or devise from a now dead ancestor, or by deed of actual gift from a living one; there being no other consideration than that of blood. Non-ancestral property is realty which came to the intestate in any other way, and personalty. *Ancestral property* passes as follows: 1. To the children and their issue, however remote. 2. To the brothers and sisters and their issue, however remote, whether of the half blood or the whole blood, provided they be of the blood of the ancestor. 3. To the ancestor, if living; if not, to his children, and their issue; then to his brothers and sisters and their issue. 4. To the half brothers and sisters of the intestate and their issue, not of the blood of the ancestor. 5. To the next of kin to the intestate, being of the blood of the ancestor, determined by the rule of the civil law. 6. To the husband or wife. 7. To the state. *Non-ancestral property*, including personalty, descends as follows: 1. To the children and their issue, however remote. 2. To the brothers and sisters of the whole blood, and their issue, however remote. 3. To the brothers and sisters of the half blood and their issue, however remote. 4. To the father. 5. To the mother. 6. To the next of kin of the blood of the intestate. 7. To the husband or wife. 8. To the state.

LECTURE XXX.

TITLE BY DEVISE. (a)

§ 164. *Preliminary explanations.* The modes of acquiring title hitherto described, derive their effect from the operation of the law. That is to say, in the cases of *occupancy*, *marriage*,

(a) See 2 Black. chap. 23; 4 Kent, lec. 67; 2 Hilliard, chap. 36; 6 Cruise, 1; Powell on Devises; Roper on Legacies; and Toller on Executors.

and *descent*, there is no express transfer or conveyance, from the party who had title, to the party who thereby acquires title. But in the remaining modes of acquiring title, there is an express transfer of title from one person to another. *Title by devise* is where a person, in anticipation of death, makes a disposition of his property by *will, testamentum*. It was not until the year 1543, that real estate could be disposed of by will; for as we have already seen, the holder of land under the feudal system, was very far from being considered as the absolute owner; at present, however, subject to the claims of creditors, and of dower and curtesy, every person capable of acting for himself, is free to dispose of his property by will, to whomsoever he pleases. There is an idea prevailing among the more ignorant classes, that a father, in making a will, must give something, no matter how little, to each of his children, or the will will not be good; but this opinion is without foundation. A man may give his property to whomsoever he pleases, to the complete disinheritance of his children; and however unnatural and inhuman this may appear, it will not affect the validity of the will. Indeed, it may be laid down, as a general proposition, that all restraints upon alienation of property, are in opposition to the prevailing spirit and policy of our institutions. When a person dies leaving a will or testament, he is called a *testator*. The property disposed of by will, is called a *bequest, legacy, or devise*, and the persons who take it, *legatees or devisees*. The person appointed in the will to settle the estate is called *executor*. Wills are here chiefly regulated by statute, and I shall give a synopsis of its provisions.

Who may make a will. In this state, any person of full age, and of sound mind and memory, and not under any restraint, may make a valid will. Married women are not excluded. (a) Corporations are excluded, because in judgment of law they never die.

Who may take by will. In this state all natural persons, without exception, are capable of taking by will, provided they be in being at the time of making the will, or be the immediate issue of persons then in being. We never have had any thing in the nature of the *statutes of mortmain* to limit the capacity of corporations; and whether they can take by will or not, will depend upon the express provisions of their charters. As to aliens we have seen that in this respect they enjoy all the privileges of citizens. There is however a contingent exception to the above universality, in the case of a *subscribing witness* to a will, whom the rules of evidence require to be disinterested; and accordingly the statute provides, that if a legacy be left to him, and the will cannot be proved without him, such bequest is void; unless he would be entitled to a portion as heir, in case there had been no

(a) Allen v. Little, 5 Ohio, 65.

will; in which case, so much of that portion shall be saved to him as is equal to the legacy.

What may pass by will. In this state every description of property, real and personal, whether held by legal or equitable title, will pass by will. This is settled not only by the various words employed in the statute, but also by the decisions of our court. But it is expressly provided that no will shall affect the claims of creditors; thus legalizing the principle of justice, that all a man can dispose of in anticipation of death, is the surplus which remains after all his debts are paid. And it is further provided that the widow's dower cannot be affected by will, unless a legacy be given her in lieu of dower; and even then she has an option which she may exercise at any time within six months; but she cannot take both. This option must be made known to the court of common pleas and entered on the minutes thereof. If the widow neglect so to make it known, she is held to have waived her legacy; and will have her dower, together with such portion of the personalty as she would have had if no will had been made. It is also provided that any devise of property shall be held to convey all the testator's interest therein, unless it shall clearly appear by the will that the testator intended to convey a less estate. And if the testator has acquired property, after making his will, such property will pass by the will, if it appear that he intended to dispose of all the property he might have at the time of his death. (a) But where property descends, in consequence of not being disposed of by the will, it is, by our statute, the first to be chargeable with the testator's debts, unless the contrary be directed; and where property specifically devised, has been taken to pay the testator's debts, the other devisees are to contribute pro rata to make up the loss, unless the contrary be directed. If either of the devisees be insolvent, his share is to be made up by the rest; and if he be dead, his estate must contribute. All questions of contribution arising under wills may be adjusted in chancery. We have before seen that land taken by devise from an ancestor is here made ancestral property, in the same manner as if taken by descent.

§ 165. *Execution of a will.* The form of a will is of no manner of consequence, provided the intention of the testator is manifest. Not a technical word is absolutely necessary. It is common enough to preface a will with an appeal to the Almighty; an allusion to the uncertainty of life; and an averment of the testator's soundness of mind; but all this is unnecessary. In general, the more direct and concise a will is, the better. But there are certain formalities required by the statute, which cannot be dispensed with.

(a) See *Lessee of Reynolds v. Shirley*, 7 Ohio, part 2, 39. *Lessee of Smith v. Jones*, 4 Ohio, 115. *Lessee of Smith v. Berry*, 8 Ohio, 365.

1. A will must be in *writing*. This is required not only by the statute of frauds, which requires all conveyances of realty to be in writing, but also by the statute of wills, which expressly requires all wills to be in writing, except *nuncupative wills*. These last cannot pass *realty*; but they are good for *personalty*, if they were made in the *last sickness*, reduced to writing within ten days after the uttering of the testamentary words, and subscribed by two witnesses, who can testify that the testator was of sound mind and not under restraint, and that he called upon some person present to witness that such was his will; and they must be proved within six months.

2. A will must be *signed* at the end thereof by the testator, or by some other person in his presence, and by his *express* direction; but since 1825, a will need not be under seal.

3. It must be *attested* and *subscribed*, in the *presence* of the testator, by two or more competent witnesses, who either saw the testator sign the will, or heard him acknowledge the signing. Prior to 1795, three subscribing witnesses were required. The witnesses need not subscribe in the presence of each other, nor know the contents nor attest every page. As to being in the *presence of the testator*, it has been held sufficient to be in the same room, so that the testator *might* see them, though in fact he did not. (a)

§ 166. *Revocation of a will.* The statute points out several ways of revoking a will, or any particular part of it, by the testator:

1. By intentionally destroying, tearing, canceling, or obliterating such will, or causing the same to be done in his presence, or by his direction.

2. By making and publishing a subsequent will; for when there are two wills, it is only the last which takes effect. But the revocation of a subsequent will does not revive a prior one, without express words to that effect, or a republication of such prior will. Nor will a nuncupative will revoke a prior written one.

3. By making a *codicil* for the express purpose of revocation; for a codicil being in general only a sequel to a will, of which it forms a part, does not *ipso facto* work a revocation, like a subsequent will; but only when it expressly provides for such revocation, or contains provisions repugnant to those of the will; and the codicil must be executed with the same formalities as the will itself.

4. By having a child subsequently born, there being none alive before, and no provision for such child in the will or otherwise. For if the testator had a child when the will was made, the subsequent birth of another does not revoke the will; but provision is made that the after-born child shall take, *as heir*, the same

(a) 4 Kent, 515.

portion of the estate as if there had been no will; to which portion, all the legatees contribute proportionably; and the case is the same where a child was supposed to be dead at the time of making the will, and the contrary turns out to be the fact; but in either case, a deduction is made from the amount to be contributed, of so much as such child may have received by way of *advancement*. But a testator may expressly provide so that the subsequent birth or discovery of a child shall not alter the dispositions made by the will. It is only in the absence of such express provision, that the law steps in to supply the omission. A subsequent marriage, without the birth of a child, does not in any case revoke the prior will, either of the husband or wife.

5. As to the effect of a subsequent conveyance, we adopt the common law, which holds the will to be revoked as to the particular portion of the estate conveyed. This is reasonable, because the conveyance though made after the will, takes effect first. But our statute provides that no subsequent contract, incumbrance, or other act, which does not wholly divest property from the testator, shall revoke the prior will in reference to such property, unless such contract, incumbrance, or other act be wholly inconsistent with the previous devise or bequest. With this exception, the property passes by the will, subject to all the rights created by the subsequent acts of the testator.

§ 167. *Probate*. A will is of no effect until *probate* has been made. For this purpose the executor, or any person interested, may bring the will before the court of common pleas. The probate must be made in the county where the property lies; or if it lie in several, then in either. The subscribing witnesses, and such others as any person interested may desire, if within the jurisdiction, must be examined in open court; if absent, their depositions must be produced, if possible; but if dead or gone to parts unknown, any other legal testimony may be taken. The testimony so taken, is reduced to writing by the clerk and filed; and if it appear to the court that the testator was competent at the time to make a will, and not under restraint, and that the will was duly executed and attested, such will and proof are recorded in the clerk's office; and a certified copy thereof is as valid and effectual as the original. This probate, however, is not absolutely conclusive as to the validity of the will; which is liable to be contested by bill in chancery, at any time within two years from the probate; or in case of disability, two years from the removal thereof. And here I would remark, that besides the four disabilities usually provided for in our statutes, namely, *infancy*, *coverture*, *insanity*, and *imprisonment*, we have in this one case a fifth, namely, *absence from the state*, which corresponds to being "beyond seas," in the English law. When a will is contested in chancery, our statute requires an issue to be made up, whether the writing produced be the last will of

the testator or not, which issue is tried by a jury, the defendant having the affirmative. (a) If any devisee in a will, know of its existence, and do not, within three years, produce it for probate, he thereby forfeits his devise. And any person having control of a will, and failing to produce it for probate after being duly cited, may be attached for a contempt, and is liable in damages to the party injured. Provision is made for depositing a will for safe keeping with the clerk of the court of common pleas; in which case, the will must be sealed up in a wrapper, and the name of the testator indorsed on the outside; and if, after the death of the testator, there be no person indorsed on the wrapper, as authorized to produce the will for probate, it will be publicly opened in court, and the proper proceedings had. When a will has been admitted to probate, and is not contested, as above provided, it binds every body interested. (b) If lands affected by a will lie in several counties, one probate is sufficient; for an authenticated copy of the will and probate will be admitted to record in any other county. I have said that a will is of no effect until probate has been made; but after probate, it relates back and takes effect from the death of the testator.

§ 168. *Other incidents.* It is universally agreed that wills are to be construed *liberally*. The great object is to ascertain the *intention* of the testator, and this always governs the construction; although for want of time, advice, or learning, he may have omitted the proper legal words. On this principle, the law dispenses with words in wills, which would be absolutely necessary in any other instruments. We have seen an instance of this, when speaking of the necessity of the word "*heirs*" in a deed, in order to create a fee, which word is not necessary in a will. We have also seen that the *rule in Shelley's case* is abrogated with respect to wills, and the intention of the testator carried literally into effect, by limiting the estate as he limited it. Again as to what are called *lapsed legacies*, our statute provides that if a devise be made to a person without naming issue, and such person die before the testator, his issue shall take, unless the contrary be expressed in the will. Another maxim of construction is, that where there are repugnant clauses in a will, that which is last in order shall prevail, though the contrary holds in a deed. Our court has repeatedly sanctioned the doctrine that the intention of the testator, whenever it can be ascertained, is the rule of construction. For example, although *manufacturing stock* is personal property, and would pass under a general bequest thereof; yet where it appeared that the testator intended to discriminate between that and other personalty, the will was so construed. Also, where property was devised to educate a child,

(a) See *Greene v. Greene*, 5 Ohio 278-9.

(b) See *Chapman's will*, 6 Ohio, 148. *Hunter's will*, 6 Ohio, 499.

and the child soon after died, yet as it appeared that the testator intended that the devisee should have a life estate, the will was so construed; although the general principle is, that a grant is void when its purpose is fulfilled. There are very few powers, in relation to the management of property, which the testator cannot confer either on the executors or trustees. If a vacancy occur in the office of executor or trustee, by reason of any contingency not provided for in the will, the court has power to fill such vacancy; and where an administrator has been appointed on the supposition that there was no will, and a will has been afterwards discovered and proved, the power of the administrator is thereby superseded, and the executor takes his place. We have seen that the testator cannot in any way limit his property further than to such persons as are in being at the time, and their immediate issue. But with this restriction, a testator may settle his property to almost any use or trust he pleases, in defiance of all the ancient technicalities. In relation to his children, the testator has power by his will to appoint guardians, until they arrive at majority; and guardians so appointed, have the same power over the persons and property of such children, unless modified by the will, as other guardians. With respect to creditors, we have already seen that no disposition of property by will can defeat their claims. Even the express discharge of a debt due to the testator will not be valid as against creditors. Nor does the appointment of a debtor to be executor operate as a discharge of the debt, as was formerly held.

The general doctrine is, that wills relating to land must be executed according to the prescribed formalities of the state where the land lies; but our statute has made an exception, in favor of wills made in any of the states or territories of the Union; which, if made and proved according to the law of the place where made, have the same validity as if made here; and authenticated copies when placed on record in the county where the property lies, are as effectual as domestic wills. And the same is provided with respect to wills executed and proved in a foreign country; except that notice of the application to have such foreign wills admitted to record, must be given through the newspapers, in order that all persons interested may have an opportunity to make resistance.

LECTURE XXXI.

TITLE BY PURCHASE.

§ 169. *Forms of conveyance.* (a) We come now to the last method of acquiring title, namely, by *purchase*. Under this head I shall discuss the subject of *conveyancing* at some length, on account of its great practical importance. In the course of our inquiries, you will have abundant reason to observe how much this branch of law has been already simplified; and how much yet remains to be done. In England, the law of conveyancing is so technical and abstruse, and the forms are so voluminous and complicated, that this is made a distinct and important branch of the legal profession; and a long apprenticeship is required to make an expert conveyancer. In all enlightened nations a fundamental distinction has been made between realty and personalty, in regard to the modes of transfer. Personal property, on account of its moveable and transitory nature, has generally been transferable by *mere delivery*, without any form or ceremony whatever. This was expressly declared to be the law of this territory by the ordinance of 1787, and has ever since continued so to be. But from the earliest periods of the English law, something more than mere delivery has been necessary to transfer real estate. (b) From its fixed and permanent character, no transfer can be evidenced by change of place; and as it is in every point of view important, that the owner should be known, a variety of forms and ceremonies have been resorted to, in order to insure *notoriety*. For the purpose of placing this matter in a clear light, I shall briefly refer to the three principal common law conveyances, namely, *by feoffment*, *by fine*, and *by common recovery*, though neither has ever been in use here; after which I shall describe the forms in actual use.

Feoffment. (c) Feoffment was the ancient mode of conveying any corporeal hereditament. It was commenced by an instrument in writing, signed, sealed, and delivered; in other words, a deed. Then followed the ceremony, so often referred to before, called *livery of seisin*, without which the deed was of no effect. This ceremony consisted in a corporeal transfer or delivery of the land to the purchaser. The parties went to the land, or in sight

(a) See 2 Black. ch. 20; 4 Kent, lec. 67; the various works upon Conveyancing, by Curtis, Oliver, Barton, Watkins, and Wood; Roberts on Fraudulent Conveyances; Sugden on Vendors.

(b) Lindley v. Coates, 1 Ohio, 243; Starr v. Starr, 1 Ohio, 321; Bentley v. Deforest, 2 Ohio, 221.

(c) See 2 Black. 310.

of it, and there in the presence of as many witnesses as could be had, the feoffor declared the contents of the deed, and then made a symbolical delivery of the land therein described to the feoffee, by actually delivering a twig or turf, or something else thereto belonging. This ceremony completed the conveyance. Blackstone says of this conveyance, that it was "the most ancient, the most solemn and public, and therefore the most easily remembered and proved." The notoriety depended upon the number of persons who witnessed the livery of seisin. The corresponding conveyance of an incorporeal hereditament, was termed a *grant*, which differed in nothing from a feoffment, but that there was no livery of seisin, it being impossible from the intangible nature of the subject.

Fine. (a) This is the name given to a conveyance by record of court. It proceeds from beginning to end upon *fictions*. The person who is to be the grantee, sues the grantor on a pretended contract to convey the land to him. The grantor thereupon comes into court, acknowledges the right of the grantee, and asks leave to compromise the suit. This leave is granted upon payment of a *fine* to the king; whence comes the name of the conveyance. A record is then made of all the proceedings, of which the parties take indented copies; and a proclamation thereof completes the conveyance. This conveyance is absolutely conclusive upon *parties* and *privies*, from the moment, and upon all other persons after five years without claim. Here then the publicity of proceedings in court, is substituted for livery of seisin.

Common recovery. (b) This, like a fine, is a conveyance by record of court. It consists, like that, of a series of *fictions*, but is much more complicated. Here the person who is to be the grantee sues for the land, alleging that the grantor is in possession without any title. The grantor thereupon prays that some person, who, as he alleges, warranted the title to him, may be called in to defend in his place, disclaiming all title in himself. This alleged warrantor makes default; whereupon a twofold judgment is rendered; first that the plaintiff or intended grantee recover the premises; and secondly, that the alleged warrantor indemnify the defendant or intended grantor, for the loss of his land. This conveyance was devised for the express purpose of cutting off estates tail, and all remainders and reversions expectant thereon: and it was permitted to have this searching effect, on account of the two fictions involved in the judgment; namely, a pretended decision upon the question of title; and a pretended recompense to the defendant by the fictitious warrantor.

Bargain and sale. (c) The ancient forms of conveyance, just

(a) See 2 Black. 348.

(b) See 2 Black. 387.

(c) See 2 Black. 338; 4 Petersdorf's Abr. 5; 4 Kent, 495; Lindsley v. Coates, 1 Ohio, 243; Thompson v. Gibson, 2 Ohio, 339; Holt v. Hemphill, 3 Ohio, 232.

described, may have prevailed in some parts of the Union; but they never were adopted in this state. The ordinance of 1787, which was the first act of legislation over the territory, prescribed two other modes of conveyance; namely, *by bargain and sale*, and *by lease and release*; and no other has ever been used. Both these forms originated under the *statute of uses* which, we have seen, if ever in force here, has not been since 1806. The original object of both these conveyances was to avoid the necessity of livery of seisin, without resorting to the records of court. I shall begin with the conveyance by *bargain and sale*. It will be remembered that the effect of the statute of uses was, to annex the legal title to the use, by providing that when any person was *seised* of land to the use of another, the legal estate should *ipso facto* pass to the latter. Prior to this statute, a bargain and sale of land was held to be nothing more than a *contract to convey*, which, if made upon a valuable consideration, equity would enforce by decreeing a legal conveyance. This very fact of a valuable consideration, was held to raise a *trust or use* in favor of the bargainee, and give jurisdiction to the court of chancery to carry it into effect. This being the existing doctrine, the effect of the statute was to change a bargain and sale into a legal conveyance. The execution of the deed, for a valuable consideration, raised a use in the bargainee, to which the statute, superseding the action of a court of chancery, at once transferred the legal estate. Here then was no troublesome ceremony of making livery of seisin, or going through the forms of a suit in court; and it is not strange that this simple mode of conveyance was at once adopted into general use. To secure, however, the notoriety, which this form would otherwise want, it was enacted in the same year, that a bargain and sale should not be held to convey a *freehold*, unless it were made by indenture, and *enrolled* within six months in one of the courts, where all persons might take cognizance of it. This *enrolment* was undoubtedly an improvement upon the preceding modes of securing notoriety, and is the origin of our present law for recording deeds. Such is the theory of a bargain and sale, under the statute of uses; and such is its theory with us, though we have not adopted that statute. We hold that the mere execution and delivery of the deed, without any other ceremony, completes the conveyance. We also hold, as a matter of form, that some consideration must be stated in the deed, which was not necessary in a feoffment, because without such consideration, a *use* could not be raised in the bargainee. Under the English law, a corporation could not convey by bargain and sale, because it could not be seised to a use; which is not the case here, because we require no seisin to a use; the conveyance taking effect here, without the intervention of the statute.

Lease and release.(a) This mode of conveyance was invented to evade one of the provisions above referred to. We have seen that the necessity of *enrolment* was confined to the conveyance of *freeholds*. Consequently a bargain and sale of an *estate for years* would be good without enrolment. Accordingly, a person wishing to make a secret conveyance, executed a lease for one year or more, which, without enrolment, vested in the lessee the use of the term for that time; to which use the statute at once annexed the possession. Now, by the common law, a person in possession as lessee, could receive a *release* of the freehold and reversion, without livery of seisin. Accordingly a release was executed immediately after the lease, and thus the conveyance was completed without either livery or enrolment. This is said to be the most common conveyance in England; but so far as I know, it is not practised at all in Ohio, though, as we have seen, it is provided for in the ordinance of 1787. At any rate, the main reason for preferring it in England, does not exist here; for such a conveyance would require to be recorded as much as a deed of bargain and sale; and the latter is the more simple and economical, because it requires but one instrument, while the former requires two. This is probably the reason why a bargain and sale is here generally preferred.

It will thus be seen that our law of conveyancing has been greatly simplified. By a slight attention to the form of a deed of bargain and sale, every man might, for all common purposes, become his own conveyancer. It will also be seen, that while personalty may be transferred by mere delivery, without even a bill of sale, realty can only be transferred by means of a deed, which must be recorded in a public office, for notice to all the world. The form and requisites of a deed will be fully described in the course of this lecture. But in the mean time, there are several preliminary considerations which require a brief notice. With respect to personalty, I shall have very little to say here, on account of the simplicity of the mode of transfer; but when I come to speak of the *contract of sale*, my remarks will relate chiefly to the sale of personalty. It must not, however, be inferred, that no right whatever to realty can be transferred without a regular and formal deed.* This is the only method of conveying a complete legal title from one person to another among the living; but an equitable title, as before explained, may be transferred by any instrument of writing, which complies with the statute of frauds; and this equitable title may be perfected into a legal title, by the decree of a court of chancery. Indeed, where the purchase money is not to be paid down, instead of making a deed and taking back a mortgage, it is very common for the vendor to make only a *title bond*, which is a contract to convey when the

(a) See Black. 339; 4 Kent, 494.

stipulated payments shall have been made. Such a contract makes the vendor a trustee for the vendee; and when the latter has complied with his part of the contract, if the vendor should refuse to make a deed, he may be compelled to do so by a decree in chancery.

§ 170. *Preliminary conditions of a valid conveyance.* Under this head I shall consider several matters affecting the validity of a conveyance, though it may have all the formalities required by law.

Fraudulent conveyances. (a) I shall reserve what I have to say on the general subject of fraud, until I come to treat of contracts, when the statute of frauds will be examined at some length. It will be sufficient here to say that this statute not only requires every conveyance of realty to be in writing, as before remarked, but also makes void every conveyance made with intent to defraud creditors or purchasers. Under the head of crimes, moreover, we shall see that severe penalties are annexed to the fraudulent transfer of property, whether real or personal. In fact, it is a general rule, that fraud vitiates every thing into which it enters. A fraudulent conveyance therefore will not be permitted to take effect; and in our subsequent remarks, we shall presuppose that the parties to a conveyance are acting in good faith. If not, a court of law, when it is possible, and a court of equity always, will set aside the fraudulent conveyance.

Conveyance without title. In this state it is made a penitentiary offence, *knowingly* to convey land, without having a title thereto either legal or equitable, properly evidenced, *with intent* to defraud the purchaser. It will be observed that three things are necessary to constitute the criminality. *First*, the entire want of title; *secondly*, a knowledge of that fact; and *thirdly*, the intent to defraud the purchaser. But if the two first exist, the third almost necessarily follows. If a man who knows that he has no shadow of title, undertakes to make a conveyance, he can have no other motive than to defraud the purchaser; but where the guilty knowledge does not exist, the criminality is taken away; and the only effect of a conveyance without title would be to lay the foundation of an action by the purchaser, either on the covenants in the deed, or to recover back the purchase money.

Conveyance without possession. (b) At common law, the conveyance of land, which at the time was in the adverse possession of another, was void; and this is the law in several of the states. Also by a statute of the 32d of Henry 8th, it was made unlawful for any person to make a conveyance of land, unless he,

(a) See Hovenden on Frauds; Roberts on Frauds; and Roberts on Fraudulent Conveyances.

(b) 2 Black. 290; 4 Kent, 446; Key v. Vattier, 1 Ohio, 132; Backus v. M'Coy, 3 Ohio, 211.

or those under whom he claimed, had been in actual or constructive possession within one year. In this state we have no statutory provision on the subject; we have no law against *champerty* or *maintenance*, which prohibited a right of action from being assigned or purchased; and we have no express decision on the question. But the reason of the ancient common law doctrine does not exist here. When livery of seisin was necessary, as it could only be made by a person in possession, a conveyance by a person not in possession must of course be void. But where the execution and delivery of a deed consummates a conveyance, without livery of seisin on the one hand, or entry on the other, there is no good reason why a conveyance of land to which the grantor has a good legal claim, should not be valid. On the whole then, I think we are safe in concluding that a conveyance by a person who has a legal claim to land, held adversely by another, is valid. The ancient idea that litigation is thereby encouraged, is utterly without foundation. An action by the vendee would do no more harm than an action by the vendor.

Conveyance pending suit. (a) Whenever there is a statute existing against champerty, or where champerty is an offence at common law, a conveyance of land during the pendency of a suit concerning it, is an act of champerty. As we recognize no such misdemeanor, the only effect of the pendency of a suit is to make the conveyance void; and this effect always follows, though the purchaser knew nothing of the existence of the suit, and paid a full price for the land. The pendency of a suit, for reasons of public policy, is held to be constructive notice to all the world, not to purchase the subject in litigation; and as against the plaintiff, such purchase, however honestly made, is totally void; though as against the defendant, if he should finally prevail in the suit, the conveyance would be good, because he would not be allowed to disaffirm his own deed. This may be often a very hard doctrine, but without it, there would be no end to litigation; for before the plaintiff had got through his suit, the defendant would convey to some one else, and thus make another suit necessary, and so on without end.

Conveyance of more than one has. (b) At common law, as we have seen, the attempt to convey a *greater estate* than the grantor had, was not only void as to the grantee, but worked a forfeiture as to the grantor. For example, if a lessee for years undertook to convey a freehold, his term was thereby forfeited to the next owner in reversion or remainder. This depended upon technical reasons arising from the feudal relation of lord and vassal. And accordingly after the statute of uses, when the courts

(a) See 4 Kent, 449; 6 Dane's Abr. 741; Jackson v. Ketchum, 8 Johns. 479; Taylor v. Boyd, 5 Ohio, 337; Ludlow v. Kidd, 3 Ohio, 541.

(b) See 4 Kent, 106; White v. Sayre, 2 Ohio, 113.

adopted many of the equitable doctrines already established in chancery, this doctrine of forfeiture was given up, and it was held that when a person attempted to convey a greater estate than he possessed, the conveyance should be good for his whole interest. This is the doctrine here, and it seems to be the only rational doctrine that could be adopted. In like manner, the conveyance of *more land* than one has, is good for whatever he has. Thus if I undertake to convey, as sole owner of a tract of land, when in fact I only own an undivided share, this will be good for such undivided share. Indeed, our court ^(a) has gone so far as to hold, that, if I own an undivided fourth, for example, of a given tract, and I undertake to convey a specific portion thereof, by metes and bounds, the conveyance will be good for an undivided fourth of the portion attempted to be conveyed. This is a novel doctrine, but it must stand as law till overruled.

§ 171. *Formalities of a deed.* (b) I now come to the particular consideration of deeds. According to Blackstone, "a deed is a writing sealed and delivered by the parties." It is said to be called a *deed*, by way of eminence, "because it is the most solemn and authentic act that a man can possibly perform in relation to the disposal of his property." The above definition does not describe a deed of the present day, because by our law *signing* is essential. With us, any instrument is a deed, which is *written, signed, sealed, and delivered*. But in common language we confine the term deed, to an instrument for the conveyance of real estate. I proceed therefore to describe the properties of such a deed. The formalities of a deed are provided for by statute. But from the ordinance of 1787, to the present time, there has been a great deal of fluctuating legislation on the subject.

A deed must be in writing: or it may be *printed*, all but the signature. The common custom is to have blank forms printed, to be filled up with writing; but the deed must be filled up before the execution. A writing not under seal may be made over a signature in blank, but for technical reasons, no sealed instrument can be thus made. (c)

It must be signed: or if the grantor cannot write, some one else must write his name, and he must ratify it. In early times, when seals had a distinctive character, signing was not necessary, but it became so under the English statute of frauds. Even without the statute, however, signing has always been necessary in this state. But I presume it would be sufficient for the grantor's name to appear in any part of the deed.

It must be sealed. (d) And it is provided by statute, that whenever a specific seal is not expressly required, "a seal either of wax, wafer, or of ink, commonly called a scrawl seal, shall be

(a) *White v. Sayre*, 2 Ohio, 103.

(b) See 4 Kent, 450; 2 Black. 295.

(c) *Ayres v. Harness*, 1 Ohio, 368.

(d) 2 Black. 295.

alike valid and deemed sufficient." In consequence of this provision, it is very rare to see any other seal to a deed than a mere flourish of a pen opposite to the signature, with the word "seal," or the initials "L. S." to show that it is meant for a seal; and this flourish is hardly ever made by the grantor himself, but usually by the scrivener, so that it becomes his only by adoption. More need not be said to demonstrate the utter insignificance of the formality of sealing; yet the conveyance would be good for nothing without it. The use of seals originated in the inability of men to write their names; and then they had a distinctive character, which identified the grantor as well as his signature. But ever since men have been able to write, and their signature has been required, and especially since a mere scrawl has been made sufficient, the requisition of a seal has been purely arbitrary. The theory is that the affixing of a seal evinces solemnity and deliberation; but as seals are usually affixed, this is, of course, mere theory; and even were it fact, still the formalities which remain to be mentioned, are amply sufficient for every useful purpose. But such is the law, and I shall consider the policy of seals in another place.

It must be attested. (a) The words of the statute are; "such deed shall be signed and sealed by the grantor, or such signing or sealing shall be acknowledged by the grantor, in the presence of two witnesses, who shall attest such signing and sealing, and subscribe their names to such attestation." The witnesses, then, must either see the grantor sign and seal, or hear him acknowledge the same, before they subscribe their names. But this need not be done in the presence of each other. It has been decided by our court, that a deed without subscribing witnesses, though not operative as a conveyance, is nevertheless a good *license* to enter and occupy for the purposes specified. Because if a license to enter be in writing, so as to comply with the statute of frauds, it is sufficient; and if possession be taken under it, it will be a good defence to an action of trespass or ejectment by the grantor. But in general, where a deed is thus defective, it is not constructive notice when recorded, and cannot operate as any thing more than a contract to convey, which a court of equity will enforce, unless there has intervened an innocent purchaser without notice; though when there are two subscribing witnesses, the fact that one is incompetent on the ground of interest, will not invalidate the deed.

It must be acknowledged. (b) The words are, "such signing

(a) *Courcier v. Graham*, 1 Ohio, 330; *Patterson v. Pease*, 5 Ohio, 190; *Barr v. Hatch*, 3 Ohio, 527; *Sullivant v. Commissioners*, 3 Ohio, 89; *Johnson v. Turner*, 7 Ohio, part 2, 216.

(b) *Roads v. Symmes*, 1 Ohio, 316; *Johnston v. Haines*, 2 Ohio, 55; *Brown v. Farran*, 3 Ohio, 140; *Moore v. Vance*, 1 Ohio, 1; *Allen v. Parish*, 3 Ohio, 107; *Livingston v. M'Donald*, 9 Ohio, 168; *Foster v. Dennison*, 9 Ohio, 121; *Connell v.*

and sealing shall be acknowledged;" but it is sufficient if the grantor says "I acknowledge this to be my deed," for it could not be his deed, without signing and sealing. The officers before whom the acknowledgment may now be taken are, a judge of either court, a justice of the peace, a notary public, and a mayor, or other presiding officer of an incorporated town or city. The officer is required "to certify such acknowledgment on *the same sheet*, and subscribe his name to such certificate." It has been held that the acknowledgment cannot be presumed from lapse of time. In fact, this follows necessarily from the provision, requiring the certificate to be on the same sheet. The presence of the certificate is the only evidence, unless when the existence of the deed is presumed; and then all the required formalities are presumed. It has also been held that the official character of the officer must appear on the face of the certificate, either in the body of it, or at the end with the subscription. The case before the court was a certified copy of a deed, in which the official character of the justice was not stated, though it could have been proved by parol. And the court said, however it might be with an original deed having this omission, it was fatal to the copy. And I can see no good reason why a difference should be made in this respect between a certified copy and the original. As to the expression "*on the same sheet*," I presume it is not intended thereby to require a deed to be upon one sheet only: the meaning is, that the certificate of acknowledgment shall not be on a separate piece of paper. The foregoing remarks embrace all acknowledgments by all descriptions of persons, with the single exception of the case where husband and wife join in a deed, either to convey the wife's land, or to relinquish her right of dower. In this case the officer is required to examine the wife apart from her husband, and make known to her the contents of the deed; and if she then declares that she did voluntarily sign, seal, and acknowledge the deed, and that she is still satisfied therewith, her conveyance will be good. And all these facts must appear in the certificate; namely, the separate examination, the explanation, the voluntariness of the act, and the present satisfaction therewith. But our court has decided that it is sufficient if the certificate contains the substance of these facts, without following the express words of the act. The reason of this formality is, that in law, unless the contrary appear, the wife is presumed to act under the restraint and fear of her husband. In fact this presumption is carried so far that in every other case her deed is void. In other words, but for this provision of the statute, she could not make a deed at all. In 1835, a healing act was passed making good all prior deeds by husband and wife, though it should not appear in the

certificate that the contents of the deed were explained to the wife; but this was only retrospective, and has been held unconstitutional. (a)

It must be delivered. (b) If all the preceding formalities have been complied with, the deed is executed and ready for delivery. The attesting words commonly used, namely, "signed, sealed and delivered in the presence of," imply that the delivery is made in the presence of the subscribing witnesses; but this is hardly ever the fact, and it is not required by the statute. The delivery, however, is an essential part of the conveyance; for as a general principle, so long as the deed remains in the hands of the grantor it is inoperative; and it would be in like manner inoperative if taken from the possession of the grantor without his consent. In a word, until he performs some act equivalent to a delivery, he retains the power to change his mind. It has been decided, however, that if a deed has been once delivered, it will be effectual though it afterwards remain in the custody of the grantor. And our court has said what comes to nearly the same thing, namely, that the redelivery of a deed once delivered, does not operate as a reconveyance of the title; also, that where a man makes a deed of trust, and directs it to be delivered and recorded, the acceptance of the trust by the grantee, and the recording of the deed, amount to a delivery, though there was no delivery in fact; also, that where a father conveys to an infant son, and puts the deed on record, this is a delivery to the son, though the father, as natural guardian, retains the custody of the deed. The delivery need not be an actual handing of the deed by the grantor to the grantee; any words or actions signifying the intention to deliver are sufficient. In fact, whenever the deed is not found in the possession of the grantor, a proper delivery will be presumed, and it will fall upon the party impeaching the deed, to prove a *non-delivery*. A deed is often delivered to third persons to hold for the parties until the happening of a given event. During this interval it is called an *escrow*, and until the event happens no estate passes. Its effect as a deed commences from the second delivery, except in certain cases, when, to prevent injustice, it is allowed to relate back and take effect from the first delivery. Where a deed has no date its operation commences from the date of delivery; and even where it has a date, if it were not delivered until after that date, it can only operate from the day of delivery, so as to affect the rights of third persons. Our court has said that the doctrine of relation back to the date, applies only to the immediate parties. The delivery of the deed completes the conveyance, with-

(a) *Good v. Zercher*, 12 Ohio, 364.

(b) See 4 Kent, 454; *Starr v. Starr*, 1 Ohio, 321; *State v. Lowry*, 4 Ohio, 72; *Souverby v. Arden*, 1 Johns. Chan. Rep. 240; *Hood v. Brown*, 2 Ohio, 267; *Lloyd v. Giddings*, 7 Ohio, part 2, 50; *Holt v. Hemphill*, 3 Ohio, 232; *Hall v. Ashby*, 9 Ohio, 96.

out livery of seisin or entry, and is effectual to pass the title of the grantor, although the land be in the adverse possession of another.

It must be recorded. (a) When a deed has been duly executed and delivered, the grantor has nothing more to do concerning it. The putting it upon record, which must be done within six months, is the business of the grantee. The reason of the law requiring it to be recorded, is to protect the grantee and the public against secret conveyances. The notoriety thereby given to the transfer is superior to that resulting from livery of seisin, and equal to that of enrolment in England. Any person who has an interest in knowing in whom the legal title to land rests, can always ascertain it by going to the records. If he find no incumbrance there, and no lien for taxes, or by judgment or decree, and have no notice of any equitable claim, he is safe in purchasing. For as an equitable title is not required to be on record, it is postponed to a legal title acquired without *actual notice* of the equity; whereas the existence of a deed on record is *constructive notice* to all the world, and no one can plead the want of actual notice. By express provision of the statute mortgages are now required to be recorded forthwith. In other words, they *take effect* from the time of recording, or rather from the time of presentation; for from the moment they are left in the office, their operation commences. But, until 1831, mortgages were placed on the same footing as other deeds still are; that is, they might be recorded at any time within six months from date, and then related back and took effect from date: this opened a wide avenue to fraud: a dishonest man might raise five times the value of his land by successive mortgages to different persons, when each supposed he was the first mortgagee; and the present law in regard to other deeds seems to be almost equally objectionable. Why should not a purchaser be required to put his deed on record immediately, so that no subsequent incumbrancer could be defrauded by a dishonest grantor? It is true we have the threat of imprisonment in the penitentiary, to protect us against such acts; but this punishment is no compensation to the man who has paid his money for a title already passed to another. The statute provides that if a deed be not recorded within six months, it shall be deemed fraudulent as against any subsequent *bona fide* purchaser, having no knowledge of its existence; but that it may be put on record after the six months, and from the date of recording, shall be notice to any subsequent purchaser. It must be borne in mind, then, that as between the parties to the deed, the fact of recording is of no consequence; since the deed is not void by omitting to record it. The sole object of recording it is to give notice to subsequent pur-

(a) 4 Kent, 456; Cuninghame v. Buckingham, 1 Ohio, 264; Northrup v. Brehmer, 8 Ohio, 392; Scribner v. Lockwood, 9 Ohio, 184; Allen v. Parish, 3 Ohio, 107; Johnston v. Haines, 2 Ohio, 55; Foster v. Dugan, 8 Ohio, 87; Burnet v. Brush, 6 Ohio, 32; Livingston v. McDonald, 9 Ohio, 168.

chasers and incumbrancers; and even as to them, our court has decided, that if they can be affected with positive or even strong presumptive notice, in any other way, they cannot impeach the unrecorded deed; and the fact of such notice may be established by parol evidence. This doctrine can never produce hardship; for the burthen of proving the actual notice will fall upon him who has neglected to record his deed; and if the subsequent purchaser knew of the former deed, it was folly to purchase, and he deserves to suffer. But if there be two deeds, and neither recorded within six months, the second deed, if executed before the first is recorded, will prevail in the absence of notice; and this doctrine has been extended to the case of a sale on execution, where the sale was confirmed before the prior deed was recorded, the six months having elapsed. The constructive notice resulting from recording, applies only to deeds, mortgages, and leases, duly executed; and if there be any defect in the execution, or if the instrument be not a deed, mortgage, or lease, the recording will have no effect, because the statute does not apply to such. But when the recorded instrument is within the statute, it is declared that a certified copy thereof shall be *prima facie* evidence of the existence of the instrument, and conclusive evidence of the existence of the record; and it has been held that even the immediate grantee may give such certified copy in evidence, without accounting for the original.

Exceptions. (a) The seven requisites of a deed now enumerated, namely, that it must be *in writing, signed, sealed, attested, acknowledged, delivered, and recorded*, are expressly extended by the statute to every "instrument of writing, by which any land, tenement, or hereditament, shall be conveyed, or otherwise affected or incumbered in law," *with the exception of* "leases of school or ministerial lands, for any term not exceeding ten years; and of any other lands for any term not exceeding three years." But there is some ambiguity in the phraseology of the statute, which it may be well to notice. The words are, "that nothing in this act contained shall be construed to affect the validity of any excepted lease, or to require such lease to be attested, acknowledged, or recorded." Now the question is, whether it was intended to except such leases altogether from the operation of the act, as the first part of the clause implies; or only as to the requisites of attestation, acknowledgment and recording, as enumerated in the last part of the clause. If the former be the intention, then these leases are left to the operation of the statute of frauds, which simply requires them to be in writing, without a seal; if the latter, then such leases are still required to be under seal. I should have little hesitation in saying that the former

(a) See *Bentley v. Deforest*, 2 Ohio, 221; *Barr v. Hatch*, 3 Ohio, 527; *Paine v. French*, 4 Ohio, 318; *Reed v. M'Grew*, 5 Ohio, 385; *Atkinson v. Dailey*, 2 Ohio, 212.

was the intention, and that these excepted leases would be good if made in writing without a seal; but I do not know that the question has been raised. It will be observed, that these requisites are expressly limited to estates "*in law*:" and hence it is that any written agreement to convey will be good in equity. Moreover, where a legal conveyance was intended, but has been frustrated by the want of any one of these formalities, a court of equity will still consider it a valid contract to convey, as between the parties, and will enforce a specific performance; but a legal title cannot be conveyed, if any one of these formalities be wanting. There is a case, where the grantee in a deed, by an indorsement on the back, assigned "all his right and title in the deed" to another; and the court held that there never was a time in this state when such an assignment would be of any avail in law; but that equity might hold it to be a valid contract to convey. The words "*conveyed, or otherwise affected or incumbered*," are as comprehensive as could have been selected; and, but for the exception in regard to leases, would include the transfer of the smallest degree of interest. It has been held, however, that a certificate of entry or a mortgage may be assigned by mere delivery; thus taking the case both out of the statute of frauds and of deeds: and the reason is, I presume, because, by the assignment, the land is not *affected* by any new incumbrance; but the ownership remains precisely as it was before the assignment.

The consideration. (a) Of the consideration of contracts, I shall speak more at large hereafter. The general principle of law is, that a consideration is essential to a contract, and where the contract is in writing, must be stated therein: but instruments under seal, form an exception to the necessity of stating the consideration; because, in the eye of the law, the solemnity of affixing a seal, is itself evidence of a consideration. As, therefore, a sealed instrument generally *imports* a consideration, none need be stated; and this was the doctrine in regard to the common law conveyances: but conveyances under the statute of uses form an exception to this exception; that is, they fall under the general principle, which requires a consideration to be stated in the contract; and the reason is this: before the statute of uses, some consideration was held necessary, as we have seen, in order to raise a use; and as the statute merely annexed the legal estate to the use, without varying the evidence necessary to create the use, the courts of law still retained the doctrine established in equity: indeed, it may be added, that the very idea of a bargain and sale, which, in theory is something different from a gift, supposes a valuable consideration: accordingly it is a

(a) 4 Kent, 461; Shepard v. Little, 14 Johns. 210; Steele v. Worthington, 2 Ohio, 182; Knobb v. Lindsay, 5 Ohio, 468; Hill v. West, 8 Ohio, 222.

settled doctrine, that a valuable consideration must be stated in the deed; but the amount is of no consequence; it being only necessary to comply with the technical requisition; and where one consideration is stated, so as to make the deed *prima facie* sufficient, a different one may be proved, so that it be not repugnant to the first. How then, it may be asked, is a father to convey to his child in consideration of natural affection, where no money passes? I answer, that he must resort to a fiction. There was a conveyance under the statute of uses, adapted to this very case, namely, by a *covenant to stand seised to the use of the child*; for which the consideration of blood was sufficient: but as this conveyance, not being mentioned in the ordinance of 1787, has never been adopted here; a conveyance to a child, in consideration of blood, being in the form of a bargain and sale to the child, must purport to be upon some valuable consideration, for the sake of form: as one dollar, for example. This doctrine respecting the consideration of a conveyance, is sufficiently absurd at best; but perhaps its absurdity will not be quite so striking, if the reason be stated thus. There is a manifest difference between a bargain for the sale of land, and a legal conveyance of that land: the former being a contract to be executed, and the latter the execution of that contract: now at common law a contract for the sale of lands would not have been binding without a consideration; but when a subsequent legal conveyance was made in execution of the prior contract of sale, this consideration was presumed, and was not, therefore, required to be stated. Under the statute of uses, however, the contract of sale and the conveyance became one act, and were effected by one instrument; and accordingly before this instrument could operate as a good conveyance, it must contain enough to make a good *prima facie* contract of sale; that is, a valuable consideration. The result, then, of the doctrine of a consideration is, that the deed must *appear on its face* to have been made upon a sufficient one; and then, as between parties, a court of law will not inquire into the fact. A deed without any consideration in fact, or with only a very inadequate one, would be perfectly binding in a court of law, except as to creditors and purchasers, under the statute of frauds: and even in equity, mere inadequacy of consideration would not vitiate a deed, unless there had been gross deception and misrepresentation.

Foreign deeds. (a) Our statute provides that all deeds out of this state, executed, and acknowledged or proved, pursuant to the law of the place, or pursuant to the law of this state, shall be as valid as if executed here. But the time for recording is the same

(a) *Allen v. Parish*, 3 Ohio, 107; *Foster v. Dennison*, 9 Ohio, 121; *McCullough v. Roderick*, 2 Ohio, 234; *Rogers v. Allen*, 3 Ohio, 488; *Sortwell v. Jewett*, 9 Ohio, 180; *Nowler v. Coit*, 1 Ohio, 519; *Willis v. Cooper*, 2 Ohio, 124; *Henry v. Doctor*, 9 Ohio, 49.

as for deeds executed within the state. The words of the statute are, "in any other state, territory or country," thus including all deeds wherever made.

§ 172. *Parties to a deed.* (a) With respect to the grantees in a deed, there is little to be said. Every natural person is capable of receiving a conveyance, and there is no general law disabling corporations. As before observed, their ability to take and hold real estate, depends entirely upon their charters. The only question as to grantees, arises when there is no person in existence competent to take; and in such case, the grant is necessarily held to be void, except it be to charitable uses; in which case the legislature may appoint a trustee of the legal title, and until such appointment, the fee remains in the donor subject to the trust. But with respect to the grantors, there are various restrictions and qualifications, both as to the ability to convey and the mode of conveying. I shall consider these in connexion with the different classes of persons to whom they apply; namely, *infants, idiots and lunatics, married women, partners, corporations, attorneys in fact, sheriffs, commissioners of insolvents, auditors, and executors or administrators.*

Infants and guardians. (b) As a general principle, we have seen that an infant can make no binding obligation. The deed of an infant, however, is not absolutely *void*, but only *voidable*. When he becomes of age, he may either confirm or annul it. If he confirm the deed, it becomes good *ab initio*; if not, it is void *ab initio*. It follows, then, that an infant can only make a valid conveyance, through his guardian; who is expressly empowered "on good cause shown, to sell all or any part of the property, whether real or personal, of his ward." This *cause* must be shown to the court of common pleas, without whose sanction, a conveyance by guardian, would be utterly void. And it will not be a *good cause*, unless, in pursuance of another provision of the statute, "the court shall be satisfied that the sale will be for the advantage of the ward, or is necessary for his maintenance." The statute makes no difference between *testamentary* and other guardians; but it is manifest, that if a will, appointing a guardian, expressly authorize him to sell the property of his ward, he may do it without leave of court; otherwise not. In case the court authorizes a sale by the guardian, he is to be governed by the same *regulations* in every respect as an executor or administrator. What these regulations are, I shall state under that head.

(a) 4 Kent, 462; Sloane v. McConahy, 4 Ohio, 157; Bryant v. McCandless, 7 Ohio, 135; Helfenstine v. Garrard, 7 Ohio, 275; Sergeant v. Steinberger, 2 Ohio, 307; Green v. Graham, 5 Ohio, 264; Fleming v. Donahoe, 5 Ohio, 255; Trustees of McIntire School v. Zanesville Co. 9 Ohio, 203.

(b) Drake's Lessee v. Ramsay, 5 Ohio, 251; Massie's Lessee v. Long, 2 Ohio, 293; Tucker v. Moreland, 10 Peters, 58.

Idiots and lunatics. (a) Idiots, as we have seen, are utterly incapable of making a valid conveyance; and lunatics can only convey, during their lucid intervals. But their guardians have the same power to sell the real estate of their wards, as guardians of minors; and are under the same regulations. The statute however mentions the payment of the debts of an idiot or lunatic, as a sufficient cause for selling real estate, which is not the case with regard to minors; also where an idiot or lunatic, when sane, had contracted to convey, the guardian is specially empowered to execute the conveyance; and all these provisions apply to *deaf and dumb persons*, if they are incapable of managing their estates. As to persons intoxicated, it has been held that if the grantor was so much intoxicated as not to know what he was doing, his deed will be set aside in chancery, although the grantee had no agency in procuring the intoxication.

Married women. On account of the legal presumption that a married woman is under the power and control of her husband, to such a degree that she cannot act freely, it is a general principle, as we have seen, that her deed is absolutely void. But as it is often desirable that she should be able to part with her own real estate, or relinquish her dower in that of her husband, it is provided by statute, that if she be eighteen years of age, she may *join with her husband* in the deed, and thus make a valid conveyance. The precautions taken to ascertain that the whole has been done by her free assent, have been already stated. Unless, however, she thus join with her husband, her conveyance is utterly void; and his power to incumber her estate, without her joining, is expressly limited by another statute, to the duration of the marriage. Accordingly any separate contract made by the husband touching the wife's land, would instantly cease on the termination of the marriage, either by the death of one of the parties or by divorce. But to this inability of the wife to make a separate conveyance of her estate, there is one exception; and that is where she acts in pursuance of a *power* legally conferred. If in the deed or will conveying to her the estate, she be expressly authorized to dispose of it in a certain manner, she can execute that power without the co-operation of her husband. With respect to conveyances to each other, the legal doctrine, that the husband and wife cannot contract with one another, makes it necessary to resort to a circuitry, when either wishes to convey to the other. The conveyance is first made, with specific directions, to a trustee, who by another conveyance, in execution of the trust, vests the title in the party intended. But since the law allows this to be thus done indirectly, what evil could result from allowing it to be done directly? Surely the trouble thereby saved

(a) *Lacey v. Garrard*, 2 Ohio, 7; *French v. French*, 8 Ohio, 214.

would be a sufficient reason for making this case an exception to the general rule; and in equity this is done.

Partners. (a) If partners own real estate, as partnership property, although in equity such property, as we have seen, is bound for the joint debts, yet in law, partners stand on the same footing as any other tenants in common; and accordingly if a conveyance is to be made even for partnership purposes, all the partners must join in the deed, with their separate signatures and seals. A conveyance in the name of the firm, with one seal for all, would not be sufficient, for two reasons. In the first place, partners are not, like corporations, authorized to use a common seal; and in the next place, one partner is not, as such, authorized to sign and seal for another. He must have a regular power of attorney for that purpose, as much as if acting for a stranger. It has, indeed, been held, that if all the partners be present and consent, a signing and sealing by one, will make the instrument the deed of the whole. But I presume this decision would not embrace conveyances under our statute. At all events, the safer course would be for all the partners to execute the deed, either personally or by attorney.

Corporations. (b) Whether corporations can hold real estate or not, depends, as we have seen, upon their charter. But having this power, their conveyances are made under the corporate seal, which is affixed by the proper officer. The corporation itself is named as grantor, its corporate name is subscribed, and the acknowledgment is made by the same officer. There is a case in our reports, where the president of a bank executed a deed in his own name, and under his own private seal; and although the corporation was properly named as grantor, yet this defect in the execution was held fatal to the deed as a legal conveyance. A court of equity, however, afterwards held the deed to be good as a contract to convey, and enforced a specific performance.

Attorneys in fact. (c) The parties hitherto spoken of have

(a) See *Greene v. Greene*, 1 Ohio, 542.

(b) *Hatch's Lessee v. Barr*, 1 Ohio, 390; *Barr v. Hatch*, 3 Ohio, 527.

(c) *Form of a power of attorney to convey land.* Be it known that ———, and his wife do, by these presents, constitute and appoint ——— their attorney in fact, with full authority to sell and convey, without reservation of dower or any other right whatsoever, the following real estate in fee simple, viz. [describe the property], and to execute a warranty deed therefor to the purchaser; and generally to do all acts necessary for conveying as complete a title thereto, as the said constituents could themselves convey; hereby covenanting with all whom it may concern, to ratify and confirm all lawful acts done in pursuance of this power. Witness the hands and seals of the said constituents this ———. [Signatures and seals of the constituents, and attestation by two subscribing witnesses.]

The state of ———, county of ———. Before me ———, a ———, personally appeared ——— and ——— his wife, the above named constituents, and acknowledged the signing and sealing of the above power of attorney, to be their voluntary act and deed for the uses and purposes therein expressed. And the said ———, wife of the said ———, being examined by me separate and apart from her said husband, and the

been owners of the land to be conveyed. Those hereafter to be mentioned are the agents of the owners, authorized to make the conveyance, either by the act of the owner, or by the operation of law. As to attorneys in fact, we have seen the general principle of law to be, that they must derive their authority to act from an instrument of as high a nature, as that which they are required to execute; for example, to execute an instrument under seal, they must be authorized by a writing under seal. But the statute of deeds goes much further. It provides that all powers of attorney, authorizing the conveyance or incumbrance of real estate, shall be signed, sealed, attested, acknowledged and certified, in the same manner as deeds; and also that such powers shall be recorded in the proper county, before the conveyance or incumbrance is made. (a) If husband and wife join in a power of attorney to convey her estate, or relinquish her dower, the statute provides that the wife may revoke such power at any time before the sale or conveyance, provided her revocation be recorded in the county; but if not so revoked, and her name be inserted in the deed made by the attorney, her rights will be thereby concluded. A conveyance by attorney is made in the name of the principal. The attorney does not affix his own signature and seal, but those of his principal. It is always well to recite the substance of the power, and refer to the book, and page of the record; though a conveyance would be good without. An executor, authorized by the will, or a trustee by deed or will, is to all intents and purposes, an attorney in fact. But where the power is conferred by will, there is an exception to the general principle above stated, that the power to sign and seal must be given under seal; since, as we have already seen, a will is not required to be under seal.

Sheriffs. (b) The parties which remain to be described, are agents appointed by the law to make conveyances for the payment of debts. They do not, like attorneys, act in the name of the owners; but simply describe themselves as officers of the law. They are *sheriffs, insolvent commissioners, auditors, and executors or administrators*. I shall begin with the *sheriff*, who acts in all cases where property is sold to satisfy a judgment or decree, except where the court of chancery appoints a master for this purpose; and the proceedings are the same on a judgment as on a decree. There was a time when realty could not be sold for

contents of the above power of attorney being explained to her, declared that she did voluntarily sign and seal and does now acknowledge the same, and that she is still satisfied therewith. Witness my signature this ——— [signature without seal.]

(a) But where the owner recognizes a sale, not made by legal authority, equity will cure the defect. *Buchanan v. Upshaw*, 1 Howard, 56.

(b) See 4 Kent, 428; 2 Black. 436; *Walsh's Lessee v. Ringer*, 2 Ohio, 333; *Fitch v. Dunlap*, 2 Ohio, 78; *Allen's Lessee v. Parish*, 3 Ohio, 187; *Bliss v. Enslow*, 3 Ohio, 269; *Curtis' Lessee v. Norton*, 1 Ohio, 278; *Buckingham v. Granville*, 2 Ohio, 360; *Wheaton v. Sexton*, 4 Wheat. 503; *Voorhees v. Bank U. S.*, 10 Peters, 449.

debt; and even now, in some places, the rents and profits only can be appropriated to this object. But here, the only distinction between realty and personalty is, that the latter must be sold first. The execution commands the officer to make the money out of the personalty; and for want thereof, out of the realty. The proceedings prior to the execution, and the writ itself, will be described hereafter. I shall here describe the proceedings on execution.

1. The first step in executing the writ is to *levy* (a) it upon the property. If it be personalty, the sheriff takes actual possession, and returns an inventory. If it be realty, the levy is made, without taking possession, by returning a description of the property.

2. The next step with respect to realty, is the *appraisement*. (b) This is made upon actual view of the premises, by three freeholders of the county, selected and sworn by the sheriff; and a copy is deposited in the clerk's office. The object of the appraisement is to prevent the land from being sacrificed; for it cannot be sold for less than two thirds of its appraised value; unless it be for a debt or tax due the state, or to make up the default of a public officer. But, though a contrary opinion was once held, it is now settled upon the fullest argument, that this provision requiring an appraisement, is merely directory to the sheriff; if he omits to have it made, he is liable to a penalty, and either of the parties to the judgment may have the proceedings staid or set aside, at any time before the execution of the deed; but afterwards, the fact that there was no appraisement, will not affect the title of the purchaser. With respect to personalty, there was no appraisement until the act of 1843 put it in the power of the judgment debtor to claim an appraisement if he saw proper.

3. The next step is to *advertise* (c) the property. The notice for realty must be given *thirty days*, and for personalty, *ten days* before the sale; either by advertisement in some newspaper printed in the county; or if there be none, then in some newspaper circulating therein; and by posting up a notice at the court house door, and in five other public places. The statute expressly provides, that if a sale be made without such advertisement, it may be set aside on motion. But this provision, like that requiring an appraisement, is merely directory to the sheriff, and if a sale be completed without it, the title of the purchaser is not thereby affected.

4. The next step is the *sale*. Realty is sold at auction, at the court house door; and personalty is sold where it happens to be. Neither the sheriff nor appraisers can purchase directly or indi-

(a) Longworth's Lessee v. Bank U. S., 6 Ohio, 536; Douglas v. M'Coy, 5 Ohio, 522; Matthews' Lessee v. Thompson, 3 Ohio, 272.

(b) See Allen's Lessee v. Parish, 3 Ohio, 187, which overrules Patrick v. Ousterout, 1 Ohio, 27; Walsh's Lessee v. Ringer, 2 Ohio, 327.

(c) Fitch v. Dunlap, 2 Ohio, 78; Stall's Lessee v. Macalester, 9 Ohio, 19.

rectly. A private sale is never permitted; the property is sold at public auction, because the law presumes that in this way it will be most likely to bring its fair value.

5. The next step is to *return* (a) the writ with the proceedings thereon to the court at its next term, pursuant to the command thereof. But provision is made, that when land has been twice offered, and remains unsold for want of bidders, the court on motion of the plaintiff, may, if they see proper, order a new appraisement, or a new levy and appraisement, as the case may require.

6. Upon the return of a sale of realty, the court examine the proceedings of the sheriff, and hear objections if any are offered. If the proceedings are found to be correct, an *order* (b) is entered on the journal, that the sheriff make a deed to the purchaser. Until this order is made, he may retain the purchase money in his hands. And it has been decided that this order of court is absolutely necessary to the validity of the deed; and if not made and entered on the journal, the deed is good for nothing. On a motion for this order, it has been held that the court will only look at the execution, and the proceedings of the sheriff, and not to any defects prior to the execution; though on a motion to set aside the execution and proceedings, everything after the judgment is examinable.

7. All is now ready for the *execution of the deed*. (c) This is done by the sheriff, who signs, seals and acknowledges the deed in his official capacity. The statute expressly provides what the deed shall recite; namely, the parties to the judgment, the kind of action, the amount of the judgment, the term when it was rendered, and the substance of the several executions. The intention is, that the deed shall show upon its face whatever is material to the title of the purchaser; and accordingly the appraisement and advertisement are not required to be recited, because they are not essential to the validity of the deed. But at the same time, the statute omits to mention the order of court, which, as we have seen, is material, though it need not be recited. The deed thus made, is declared to be *prima facie* evidence of the legality of the sale and the proceedings therein, until the contrary be proved; that is, the burthen of impeaching the deed,

(a) As to amending returns, see *Fowble v. Rayburg*, 4 Ohio, 45; *Fowble v. Walker*, 4 Ohio, 64.

(b) *Curtis' Lessee v. Norton*, 1 Ohio, 278; *Boal v. King*, 6 Ohio, 11; *Buckingham v. Granville*, 2 Ohio, 360; *Walpole's Lessee v. Ink*, 9 Ohio, 142; *Wheaton v. Sexton*, 4 Wheat. 503; *Voorhees v. Bank U. S.*, 10 Peters, 449. As to paying over money, see *Stone v. Ruffin*, 2 Ohio, 503; *Dawson v. Holcomb*, 1 Ohio, 275; *Numlin v. Westlake*, 2 Ohio, 24; *State v. Coffee*, 6 Ohio, 150.

(c) *Riddle v. Bryan*, 5 Ohio, 48; *Vattier v. Lytle*, 6 Ohio, 477; *Armstrong's Lessee v. M'Coy*, 8 Ohio, 128; *Glover's Lessee v. Ruffin*, 6 Ohio, 255; *Ludlow's Lessee v. Park*, 4 Ohio, 5; *Beggs v. Thompson*, 2 Ohio, 95; *Carlisle's Lessee v. Longworth*, 5 Ohio, 368; *Boal's Lessee v. King*, 6 Ohio, 11; *Earl's Lessee v. Shoulder*, 6 Ohio, 409.

for want of correctness in the proceedings, falls upon the other party; while the purchaser is required in the first instance merely to produce his deed, without proving any of the preliminaries. And the statute further declares that such deed shall vest in the purchaser as good a title as was vested in the party, at, or after the time when his land became liable to the satisfaction of the judgment. But the nature of a judgment lien will be considered hereafter.

Commissioners of insolvents. (a) We have seen that by the act for the relief of insolvent debtors, a commissioner of insolvents is appointed in each county, to receive and dispose of their property for the benefit of their creditors. Every person applying for the benefit of this act, is required to deliver to the commissioner a written inventory of all his property, both real and personal, together with a written assignment thereof. And this assignment operates as a *conveyance* to the commissioner of all the interest of the applicant, though it is expressly provided that no particular form of assignment shall be required. Here then is a case where real estate may be conveyed by the act of the owner, without the formalities of a deed. It is sufficient if it be in writing, and the property will pass, though not particularly specified, either in the inventory or schedule; such being the express provision. But as this is in derogation of the general law, our court has decided that an assignment by an insolvent debtor in Pennsylvania, does not pass his real estate in Ohio, for this can only be transferred in pursuance of our own laws. As this point has been twice decided, we must consider it the law; but I cannot perceive its propriety, for in the statute of deeds it is expressly provided, that conveyances made pursuant to the laws of other states shall be good here. The commissioner, being thus made the trustee of the legal title, is directed to have the property appraised, and sell the same at public auction, after giving at least thirty days' notice. This is all that the statute says on the subject. It is entirely silent with respect to the deed to be made by the commissioner. But it is manifest that such deed will convey all the title which the insolvent had at the time of application, and must be executed with all the formalities of any other deed. As to the recitals, it would be proper after the analogy of a sheriff's deed, to recite the *application, assignment, and sale*; though, as these are not expressly made necessary, the deed would be valid without them.

Auditors. (b) By the present law the auditor is the person

(a) *M'Cullough's Lessee v. Rodrick*, 2 Ohio, 234; *Rogers v. Allen*, 3 Ohio, 488; 2 Black. 285; 2 Kent, 389.

(b) On the general subject of tax titles, see *Holt v. Hemphill*, 3 Ohio, 232; *Carlisle v. Longworth*, 5 Ohio, 368; *M'Millan v. Robbins*, 5 Ohio, 28; *Lafferty v. Byers*, 5 Ohio, 458; *Dudley v. Little*, 2 Ohio, 504; *Masterson v. Beasley*, 3 Ohio, 301; *Runkendorf v. Taylor*, 4 Peters, 349; *Wallace v. Seymour*, 7 Ohio, part 1, 156; *Rennick v. Wallace*, 8 Ohio, 539; *Thompson's Lessee v. Gotham*, 9 Ohio, 170.

appointed to make conveyance of land sold for taxes. In discussing this topic, therefore, the whole subject of *tax titles*, comes under consideration; and our court has laid down, and reiterated the doctrine, that much greater strictness is to be observed with respect to these titles, than with respect to titles acquired under execution. The purchaser is bound to inquire whether all the preliminary requisitions of the law have been complied with; and it therefore becomes important to know what these are.

1. The land must have been regularly *listed* (a) by the assessor for taxation. This must be done by the twenty-fifth of May in each year, if it has not been done before, though the lien of the state commences on the first of March.

2. The land must be *assessed*. This must be done and returned by the *assessor*, by the first Monday of June in each year, if not done before.

3. There must be a *duplicate of assessments*, made by the auditor, and a copy handed to the treasurer, by the fifteenth of August in each year, for collection; and in this duplicate all land returned delinquent the preceding year, must be charged with the delinquent tax, and *twenty-five per cent.* penalty and interest, as well as the tax of the current year.

4. There must be a *notice* of the aggregate amount of taxes for each hundred dollars in value. This must be given by the treasurer, immediately after receiving the duplicate, by advertising six weeks in the newspaper, and posting in three places in each township.

5. A *delinquency* does not exist until the twentieth day of December. After which the treasurer may *distrein* personal property. (b) But payment may be made at any time before distress, by paying *five per cent.* penalty.

6. On the first Monday of January, the treasurer must settle with the auditor, and make return of the *delinquent taxes* under oath.

7. By the first day of October in each year, the auditor must make out a *list* of all land returned delinquent for the preceding year, charging the delinquent tax, with the penalty of twenty-five per cent. and interest, and the current tax. This list, certified and signed, must be published (c) for four weeks, together with a notice that such land will be sold to pay the taxes and charges, on

(a) As to what description will be sufficient in the list, duplicate, and notice of delinquency, see *Massie's Lessee v. Long*, 2 Ohio, 287; *Lafferty's Lessee v. Byers*, 5 Ohio, 458; *Treon's Lessee v. Emerick*, 6 Ohio, 391; *Willey v. Scovelle's Lessee*, 9 Ohio, 43. The result is that the land must be identified.

(b) Query, if an action of debt can be brought when there is nothing to distrein. It has been held that a bill in chancery may be filed in the nature of a creditor's bill. *Supervisors, &c. v. Durant*, 9 Paige, 182.

(c) *Winder's Lessee v. Sterling*, 7 Ohio, part 2, 190; *Kellogg's Lessee v. McLaughlin*, 8 Ohio, 114; *Parker's Lessee v. Miller*, 9 Ohio, 108.

the second Monday in January, unless payment be previously made. This list and notice, with the name of the paper in which it was published, must be recorded by the auditor, in a book to be kept for the purpose.

8. On the second Monday of January, the treasurer must sell the land at the court-house, for cash only; that is, the person offering to pay the taxes and charges due on a given tract, for the *least quantity* thereof, upon immediate payment, becomes the purchaser of such quantity; of all which the auditor, who is required to be in attendance, must make a record. The auditor must also give the purchaser a *certificate* of purchase, specifying the price and quantity, which certificate is assignable.

9. At any time within two years from the sale, or in case of disability, two years from the removal thereof, the owner may *redeem* (a) the land sold, by application to the court of common pleas. But he must give six weeks' notice of his intention, in some newspaper; and must deposit in court the amount for which the land was sold, all taxes subsequently paid and interest, together with *fifty per cent.* on that amount, as redemption money. If on hearing, the court allow him to redeem, he must also pay the costs of the application; and compensate the purchaser for all valuable improvements made on the land since the sale. And he must, within thirty days, cause a certified copy of the *order of redemption* to be recorded in the recorder's office. This order vests in the applicant all the title which passed by the sale.

10. After the lapse of two years, the holder of the certificate of purchase, if the land has not been redeemed, may produce the same to the auditor, and require a *deed*; and the auditor is then bound to make the deed. Nothing is said about *recitals*, but it would seem from analogy to a sheriff's deed, that the auditor's deed should recite all the essential preliminaries before enumerated; though probably a deed would not be void for want of these recitals.

11. The statute then provides as follows: "that the deed *so made* by the auditor shall vest in the grantee, a good and valid title both in law and equity, and shall be received in all courts as *prima facie* evidence of a good and valid title." And upon this provision, our court has decided, that before an auditor's deed can be offered in evidence to prove the title of the purchaser, proof must be given of the legality of the sale, by transcripts from the various records of the proceedings on which the sale is founded; and then the deed will be *prima facie* evidence of title; that is, it will not be necessary to go back beyond these proceedings, unless it be to answer objections raised on the other side. As the

(a) On the subject of redemption, see *Street v. Francis*, 3 Ohio, 277; *Masterson v. Beasley*, 3 Ohio, 301.

right owner may not always be known, it is provided that the fact of the land being listed in any other name, shall not invalidate the sale, provided the land were in other respects sufficiently *described*. And to prevent any transfer from affecting the claim of the state, it is provided that the *lien of the state* for taxes shall attach on all real estate, on the first day of March annually, and shall be perpetual for all taxes due or to become due. Also that when sold for delinquency, this lien shall be transferred to the purchaser; so that if his title should fail, he should still have a valid claim upon the land for the amount by him paid.

12. If land offered for sale, be not sold for want of bidders, the land is thenceforth *forfeited* (a) to the state; but may be redeemed at any time before being sold by the state, by payment of all taxes and charges, and those which would have accrued, in case the land had continued on the tax duplicate. Sales of forfeited lands are made biennially on the second Monday in December, from 1831 onward, pursuant to advertisement, continued four weeks from the 15th of October.

13. On the subject of tax titles, the following additional points have been decided. Upon a sale of land for taxes, an agreement among several that they will advance funds and one shall buy, so as to prevent competition, and afterwards to divide the land among them, is illegal, and equity will set aside the sale, on payment of the purchase money and interest, with fifty per cent. penalty, and costs. On an application to redeem land sold for taxes, the *validity of the title* of the applicant cannot be called in question. All he has to show is a *right to redeem*; and for this purpose it is sufficient, that he or those whom he represents, are in some way connected with the title, as by deed, descent, contract or possession under claim of title. When lands are advertised to be sold for taxes, they must be described with such certainty, that the real owner, though his name were not given, may know the land; and that persons intending to purchase, may also know it. On the whole, then, it will be perceived from this outline, that tax titles must always be liable to great uncertainty. Indeed, as our court has observed, the general impression is, that they are good for nothing; and for this reason, land sold for taxes, is almost always sacrificed for a small part of its value.

Executors and administrators. (b) In this connection I am only to consider the proceedings of executors and administrators, so far as connected with the sale of property; their general powers and duties having been before described. Where an executor is expressly empowered by the will to sell the land for

(a) On this subject, see *Winder's Lessee v. Sterling*, 7 Ohio, part 2, 190; *Reynolds v. Leiper*, 7 Ohio, part 1, 17.

(b) See ante lecture 18; 2 Black. 480; *Goforth's Lessee v. Longworth*, 4 Ohio, 120; *Ludlow v. Johnston*, 3 Ohio, 553; *Lieby v. Parks*, 4 Ohio, 493; *Ludlow v. Parks*, 2 Ohio, 38; *Taylor v. Galloway*, 1 Ohio, 232; *Tiernan v. Beam*, 2 Ohio, 383.

any purpose, he may act without any order of court. The will is his letter of instructions, and this he must obey, unless it be contrary to law. But where no such power is given by the will, the executor, like the administrator, acts simply as an officer of the law, and must resort to the court for instructions. In speaking, therefore, of their proceedings in the sale of real estate, it will be unnecessary to name both. If there be any provision which does not apply to both, it will be pointed out. By our law, all the property real and personal, of a deceased person, is liable for the payment of his debts; the personalty first, and then the realty. But though the personalty has been exhausted, in the manner pointed out by the act, without paying all the debts, the realty cannot be touched without an order of court; to obtain which, application must be made by petition to the court of common pleas, to which all persons interested must be made defendants and notified thereof by subpoena or otherwise. And if the court are satisfied that a sale is necessary, three appraisers are appointed, to assign dower, if there be a widow, and then to return an appraisement of the value of the estate. Upon which return, the court order a sale of the whole or part, as the case may require. If there be no dower to assign, the order of appraisement and sale may be made at the same time; and if an appraisement of the realty was returned by the executor or administrator originally, a new appraisement is not required. The notice of sale must be given by advertisement for four weeks, after which the sale is made at auction at the door of the court house: and if the land be improved, it must sell for *two thirds* of the appraised value; if not, for *one half*. But after being twice offered and not sold, the court may either direct the amount for which it shall be sold, or order a new appraisement. Our statute declares, that the sale shall be upon deferred payments, not exceeding two years, with interest. But persons interested in the land may prevent a sale by giving security for the payment of the debts mentioned in the petition. If a sale of so much as would pay the debts, would injure the value of the residue, the whole may be sold, and the surplus distributed under the order of the court; but in all cases of surplus from the sale of realty, such surplus goes to those who would have had the realty. After the sale, a return must be made of the proceedings to the next term of court; and if the court are satisfied that the sale has in all respects been legally made, they order the sale to be confirmed, and that a deed be made to the purchaser. The statute then declares that such deed shall be received in all courts as *prima facie* evidence that the executor or administrator has in all respects observed the directions and complied with the requisitions of the law, and shall vest the title in the purchaser, in like manner as if conveyed by the deceased in his life time. Nothing is said concerning the *recitals* in the deed, but from the strong analogy between this and a sheriff's deed, it would certainly be proper to

recite all the essential preliminaries, though perhaps not absolutely necessary. The power to sell is expressly extended to equitable, as well as legal estates. It has been decided that an order of court is absolutely necessary to sustain the sale; and where the records do not show such order, it cannot be presumed, or proved by parol. Where the court making the order, has jurisdiction of the case, the question whether it was made on a proper state of facts, cannot be collaterally examined. So far as the rights of purchasers are concerned, such orders are as available as judgments. This power to sell land under an order of court is strictly a legal power, and cannot be aided in equity. The order must precede the sale. A subsequent order cannot be given in evidence to sustain the sale.

§ 173. *Form of a deed.* (a) No particular form of words is required by law to make a deed valid. The following words

(a) *Form of a quit-claim deed.* Be it known that ———, and ———, his wife, in consideration of \$—— to them paid by ———, do hereby bargain, sell, and quit claim to the said ———, his heirs, and assigns for ever, the following real estate, viz: [describe the property,] together with all the privileges and appurtenances to the same belonging; to have and to hold the same, to the said ——— his heirs and assigns for ever; hereby covenanting that the title so conveyed, is clear, free, and unincumbered by any act of the grantors herein. In witness whereof, the said ———, together with ———, his wife, who hereby releases all claim of dower, hereunto set their hands and seals, this ———. [Signatures and seals of the grantors, and attestation by two subscribing witnesses.]

State of ———, county of ———. Before me ———, a ———, personally appeared ———, and ———, his wife, the grantors in the above conveyance, and acknowledged the same to be their voluntary act and deed. And the said ———, wife of the said ———, being examined by me separate and apart from her said husband, and the contents of the above deed being made known and explained to her, declared that she did voluntarily sign and seal, and does now acknowledge the same, and that she is still satisfied therewith. Witness my signature, this ———. [Signature of the officer.]

Form of a warranty deed. Be it known that ———, and ———, his wife, in consideration of \$—— to them paid by ———, do hereby bargain, sell, and convey to the said ———, his heirs, and assigns for ever, the following real estate, viz: [describe the property,] together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said ———, his heirs and assigns for ever; hereby covenanting that they own the property so conveyed in fee simple, and without incumbrance, and that they will warrant and defend the same against all claims whatsoever. In witness whereof, the said ———, together with ———, his wife, who hereby releases all claim of dower, hereunto set their hands and seals, this ———. [Signatures and seals of the grantors, attestation by two subscribing witnesses, and certificate of acknowledgment, as before.]

Form of a mortgage, with power to sell. Be it known that ———, and ———, his wife, in consideration of \$—— to them paid by ———, do hereby bargain, sell and convey to the said ———, his heirs and assigns for ever, the following real estate, viz., [describe the property,] together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said ———, his heirs and assigns for ever; hereby covenanting that they own the property so conveyed in fee simple and without incumbrance, and that they will warrant and defend the same against all claims whatsoever.

Provided, however, that if the said ———, or any other person for him, shall pay to the said ———, or those claiming under him, the sum of \$——, in ——— months after this date, according to the tenor and effect of a promissory note of this date, then this conveyance shall be void.

would be amply sufficient to convey a fee simple with warranty: "I, A. B. in consideration of ——— dollars to me paid by C. D. do hereby bargain and sell to C. D. and his heirs, the following tract of land, viz. ——— and do hereby warrant the title. Witness my hand and seal this ———." But the universal practice is, to extend a deed, by means of repetition, tautology and circumlocution, over many times the above space. The origin of this abuse, is to be traced to the cupidity of conveyancers. In England, as before observed, conveyancing forms a profession by itself, to a much greater degree than it does here, on account

And for the better securing the aforesaid payment, as well as to save the expense and delay of legal proceedings, the said ———, and ———, his wife, do hereby appoint ———, his heirs, executors, administrators, and assigns his attorneys in fact, with power to keep the buildings on the said premises fully insured and in repair, at the expense of the said ———, until payment; and in case of default of payment at maturity, to lease the said premises, and receive the rents, and apply them towards such payment, or to sell the said premises at public auction, giving such notice thereof as is required in sales on execution, and execute a warranty deed to the purchaser; and out of the proceeds of sale, to pay the said debt, together with interest, costs, charges and assessments, and the balance, if any, to pay over to the said ———; hereby covenanting with all concerned, to ratify and confirm all acts lawfully done in pursuance of this power. In witness whereof the said ———, together with ———, his wife, who hereby relinquishes all claim of dower, hereunto set their hands and seals this ———. [Signatures and seals of the mortgagors, attestation by two subscribing witnesses, and certificate of acknowledgment, as before.]

Form of a lease. This indenture of lease, made this ———, between ——— of the first part, and ——— of the second part, witnesses: that the party of the first part, in consideration of the rents and covenants hereafter mentioned, does demise and lease to the party of the second part, his representatives and assigns, the following real estate, viz: [describe the premises,] together with all the privileges and appurtenances to the same belonging; to have and to hold the same for the term of ——— years from the date hereof, at the annual rent of \$ ———, payable [state the terms of payment;] and it is hereby covenanted between the said parties, that the said party of the second part, his representatives and assigns, shall pay the rents above reserved, at the times above specified, unless the premises shall be destroyed by inevitable accident; but shall not be liable for ordinary wear and tear, nor for any injury which can be insured against, nor for any taxes, charges or assessments, nor for repairs, except voluntary waste; and that in case of default of payment at any time, for the space of ——— days after rent becomes due, the party of the first part, his heirs and assigns may re-enter upon the leased premises, and have and hold the same, as if this lease had not been made; but otherwise, shall keep the premises in good repair, and not molest the party of the second part; who, performing his covenants, shall quietly hold and enjoy the leased premises during the term aforesaid, and peaceably surrender possession thereof, at the expiration of said term. In witness whereof, the said parties hereunto, and to a duplicate hereof, set their hands and seals, the day and year aforesaid. [Signatures and seals of lessor and lessee, attestation by two subscribing witnesses, and certificate of acknowledgment, as before.]

Form of a bill of sale of a ship or steamboat. Be it known that ———, in consideration of \$ ——— to him paid by ———, does hereby bargain and sell to said ———, his representatives and assigns, the body of the steamboat called the ———, with her apparel, tackle, and furniture, now lying at the port of ———, the certificate of whose enrolment [or registry] is as follows, viz., [copy it in full;] and the said ——— does avow himself to be the lawful owner of the same, and does hereby warrant the title thereto. Witness the signature [and seal, though not essential] of the said ———, this ———. [Signature and attestation by one or more witnesses, the latter not essential.]

To make this a mortgage, add a proviso as in a mortgage of realty.

of the admirable simplicity of our land laws; and the charges being in proportion to the labor, it becomes the interest of this branch of the profession, to make the forms as prolix as possible. Accordingly, wherever a word could be inserted to increase the length of a deed, it has been done; and this abuse, though considerably diminished, is by no means entirely corrected in this country. In proof of which, as well as for the purpose of explaining the nature of a deed, I shall carefully analyze one of our common forms, consisting of the following parts; namely, the *introduction, granting clause, description, habendum clause, covenants, conclusion, and certificate of acknowledgment.*

Introduction. "This indenture made this ——— day of ——— in the year of our Lord ——— between *the grantor* [naming him] of the city of ———, county of ———, and state of ———, of the first part, and the *grantee* [naming him], of the same city, county and state, of the second part, witnesseth." Here the deed is described as an "*indenture.*" The meaning of an indenture originally was, that the deed was executed by two or more parties, each of whom took *copies or counterparts*; and these copies or counterparts were so *indented* as exactly to fit each other. This formality of indenting is of no use whatever, and is now seldom practised; but the instrument is still called an indenture, because made or purporting to be made, between two or more *parties*. But no person is strictly a *party*, who does not execute the deed; and in a simple conveyance in fee, it is only the grantor who executes; though in a lease, where there are mutual covenants, both lessor and lessee execute; in strict accuracy, therefore, an indenture is not the proper form of conveying in fee. It is in common use, however, and has this advantage, that if there be several grantors or several grantees, having been once named at length in the *introduction*, they may, through the rest of the deed, be indicated as "*parties to the first part,*" or "*parties to the second part;*" and thus shorten the deed. In the above introduction, the *date* is contained; and it is usually expressed in words and not figures, because figures are so easily altered; but the deed would undoubtedly be good, if all the *numerals* were in figures, or even if there were no date. The *residence* also of the parties, is expressed by city, county, and state; but this is not essential; for if the question becomes necessary it can be proved by parol. Formerly the *office or occupation* of the parties was also stated, or in law phrase, their "*addition;*" but this is useless. When a deed is not an indenture, it is called a *deed poll*, or single deed; and then the introduction is as follows: "Know all men, by these presents, that I," &c. In this form, the date does not appear until the end of the deed, and the grantor speaks in the first person. The phrase "these presents," has this apology, that it is a literal trans-

lation of the Latin words, *hæc presentia*. I hardly need add that the appeal "to all men," is without use or meaning.

Granting clause. (a) After the introduction, the only difference between the *indenture* and *deed poll* is that above indicated; and therefore I shall confine myself to the indenture. After the word "witnesseth," the granting clause is as follows:—"That the said *grantor*, for and in consideration of the sum of — dollars, in lawful money of the United States, to him in hand paid by the said grantee, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, aliened, released, conveyed and confirmed, and does by these presents give, grant, bargain, sell, aliene, release, convey and confirm, unto the said grantee, his heirs, and assigns for ever, all," &c. Here you have an insight into the art of amplification. I shall first indicate the words which may be left out, and then comment upon what is essential. The expressions, "for" and "in consideration of," need not both be used. The money need not be stated to be "in lawful money of the United States." The expressions "to him in hand paid" and "the receipt whereof is hereby acknowledged," need not both be used. The statement of the conveyance in the past and present tenses, "has given, &c." and "does give, &c." is an insult to common sense; either tense is sufficient: and the use of eight different words, "give, grant, bargain, sell, aliene, release, convey, and confirm," to express the act of conveying, is without apology. The proper words in this state are "bargain and sell." But any other words which indicate the intention, as "grant," or "convey," would do equally well. The word "sell," would alone be sufficient. The word "heirs," we have seen, is necessary; but the word "assigns," is not; for the right of alienation is inseparable from a fee, without being expressed. In fact, any words inserted in restraint thereof, would be rejected as repugnant to the estate granted. The words "for ever" are not necessary, for perpetuity is implied in the word "heirs." When the granting clause has been thus pruned of about three fourths of its verbiage, it will contain simply a statement of the *receipt* (b) of the consideration, and the *conveyance* of the estate. The nature of the consideration has been already described. As to the *receipt* expressed in the deed, it is not conclusive, and parol evidence will be admitted to show that the money was not in fact paid. But it is *prima facie* evidence of payment, and throws the burthen of proving a nonpayment on the grantor. In a lease, the granting clause varies considerably from the above. The consideration usually stated is, "the rents and covenants hereinafter mentioned."

(a) *Ewing v. Higby*, 7 Ohio, 198; *Hart v. Johnson*, 6 Ohio, 87; *Hall v. Ashby*, 9 Ohio, 96; *Foster v. Dennison*, 9 Ohio, 121; *Piatt v. St. Clair*, 7 Ohio, part 2, 165; *M'Farland v. Febiger*, 7 Ohio, 194; *Foster v. Dennison*, 9 Ohio, 121.

(b) See *Shepard v. Little*, 14 Johns. 210.

The operative words are "lease," or "demise." The word "heirs," is not used; and the word "assigns," is not necessary, because the power of assigning or underletting is implied, where the contrary is not stated. It has been decided (a) that where a wife signs and acknowledges the deed, but is not named in the granting clause nor elsewhere, as conveying any interest, her dower is not barred. Also that if she only be named in the conclusion as relinquishing dower, the deed will not convey a fee held in her own right. If there be any *recitals* (b) in a deed, their proper place is between the introduction and the granting clause, but they may occur elsewhere. Their effect is to preclude those who trace title through deeds containing them, from denying their truth or notice of what they contain. But if such recitals contain errors in fact, they may be corrected by parol, when they are not the essential part of the conveyance.

Description. (c) The description of the premises is an essential part of the deed; and the general principle is, that it should contain particulars enough to enable a man to ascertain with certainty the land conveyed, from the deed itself. This results from a rule of evidence, that *parol* testimony cannot be introduced to modify a written contract. In regard to deeds, the rule is thus stated: Parol evidence is not admissible to contradict, vary, or add to, the terms of a deed. Of the various exceptions and modifications of this rule, I cannot here speak. As applied to the description of the premises in a deed, the result is this. If there be a *patent ambiguity*, that is, an ambiguity apparent on the face of the deed, such that the mere reading of the description will show that it does not identify the land, the deed is void for uncertainty. But if the ambiguity be *latent*, that is, discoverable, not from the words employed, but only from a reference to extrinsic facts and circumstances, then the description may be aided by parol evidence. But what is necessary to make a good description, will be best understood from a statement of particulars. The means made use of to describe land are chiefly three; *first, specific boundaries*, commonly called *fixed monuments*, or *metes and bounds*; *secondly, courses and distances*, as determined by the

(a) M'Farland v. Fehiger, 7 Ohio, 194; Foster, v. Dennison, 9 Ohio, 121.

(b) Douglas v. Scott, 5 Ohio, 194; Wallace v. Miner, 6 Ohio, 366; Reeder v. Barr, 4 Ohio, 446; Matoon v. Clapp, 8 Ohio, 248; M'Chesney v. Wainwright, 5 Ohio, 452; Scott v. Douglas, 7 Ohio, 227; Glover v. Ruffin, 6 Ohio, 255; Ludlow v. Park, 4 Ohio, 5.

(c) See 4 Kent, 455; 1 Phillips on Evidence, 473—480; 4 Comyn's Dig. 287; Worthington v. Hylyer, 4 Mass. 196; Blake v. Doherty, 5 Wheat. 359; Reisch v. Dickson, 1 Mason, 10; Jackson v. Clark, 7 Johns. 217; Revere v. Leonard, 1 Mass. 91; Powell v. Clark, 5 Mass. 355; Howes v. Barker, 3 Johns. 506; Stebbins v. Eddy, 4 Mason, 414; M'Chesney's Lessee v. Wainwright, 5 Ohio, 452; M'Culloch v. Aten, 2 Ohio, 307; Douglass v. M'Coy, 5 Ohio, 524; Walsh v. Ringer, 2 Ohio, 327; Alshire v. Hulse, 5 Ohio, 534; M'Coy v. Galloway, 3 Ohio, 282; Benner v. Platter, 6 Ohio, 504; Garit v. Chambers, 3 Ohio, 495; Hopkins v. Kent, 9 Ohio, 13.

compass and chain ; and *thirdly, quantity*, as determined by computation of the number of *acres*. With regard to these, the established principle is this ; specific boundaries control courses, distances and quantity ; that is, if a description contain specific boundaries alone, without course and distance, or quantity, it will be sufficient ; if it contain all three, and the course and distance or quantity be incompatible with the specific boundaries, the latter prevail ; if it contain only course and distance, and quantity, and the quantity disagree with the course and distance, the latter prevail ; and if it contain course and distance only, it will be sufficient ; but quantity only is never sufficient. When all the particulars mentioned are necessary to ascertain the property conveyed, they must all agree ; but when there are particulars sufficiently certain to designate the property, the addition of circumstances false or mistaken, will not frustrate the conveyance. Where land is described as "*between*" certain limits, the limits themselves are excluded. If the description name a monument not existing at the execution of the deed, and the parties afterwards agree to fix one, such agreed monument prevails, though not exactly coincident with the line described in the deed. The mention of the quantity of acres, after a specific description, does not amount to a covenant as to that quantity ; but if the land has been paid for according to the quantity stated, and the quantity turns out to be less, the grantee may resort to chancery. When the quantity is qualified by the words "*more or less*," or similar words, the buyer takes the risk, and cannot be relieved even in equity, unless there be actual fraud. When land is sold at so much for the entire parcel, as for a field enclosed, or an island in a river, any surplus over the stated quantity belongs to the grantee. Where the description is "*part of a lot*" or "*one acre of a lot*," it is too vague to sustain a sale. Where a deed refers to another deed for the description, and the land can be ascertained by such reference, the description is good. Neither the town nor county need be stated in the description, if the land can be otherwise identified. Where the description is "*so many acres in the south-west corner of a given section*," it is good, and the land must be laid out in a square. But if it be "*so many acres on the south side*," the whole south line must be the base of a rectangle. Where the description specifies "*a tree on the bank of a creek, thence down the creek with the meanders thereof*," low water mark is the boundary, even though the tree be at some distance from the bank ; for neither corner trees nor line trees are required to be in the actual line ; the nearest and most permanent objects may be selected. We have seen that where land is advertised to be sold for taxes, the description must be as certain as in a deed ; but our court has decided that a defective description in a levy upon land, may be supplied by parol. When the description has been given according to the foregoing principles, it is usual to find the follow-

ing addition:—"and all the estate, right, title, interest, claim, and demand of the said grantor, of, in, and to the said premises and every part thereof; together with all and singular the privileges and appurtenances to the same belonging; and the rents, issues, and profits thereof." But this can have no other effect than to lengthen the deed; for it is a general principle, that when land passes, all that is appurtenant thereto passes with it, whether mentioned or not. We have seen that when a man grants "all his estate" in a certain piece of land, all his interest thereby passes; and even if it were not so, the brief expression, "*with the appurtenances*," would express as much as all the above verbiage.

Habendum clause. (a) Immediately after the description, it is usual to insert the following words: "To have and to hold the premises hereby bargained and sold, or meant, or intended so to be, with the appurtenances, to the only proper use and behoof of the said grantee, his heirs and assigns for ever." The original purpose of this clause, which is a literal translation from the Latin form, was, to explain the nature of the grant, and specify the *tenure* by which the land was to be held: but as we have no peculiarity of tenure, and as the nature of the estate conveyed has been already specified in the granting clause, this clause is utterly useless in common deeds. In deeds of trust, however, it is convenient to insert the habendum clause, for the purpose of specifying therein the trust created; though it is not necessary even there. In leases, also, it is usual to state the duration of the lease and the terms of rent in this clause, in the following language: "To have and to hold the said demised premises with the appurtenances to the said *lessee* and his assigns, from the said ——— day of ——— for and during, and to the full end and term of ——— years from thence next ensuing, and fully to be complete and ended:" but of this it is sufficient to say, that the whole might be expressed with equal force, by inserting immediately after the description the following words: "for the term of ——— years from the said ——— day of ———:" and in common deeds, where there is no trust to be expressed, the clause had better be omitted altogether. I will only add, that where it is inserted, it becomes void, if it be repugnant to the estate created by the granting clause.

Covenants. (b) We have before observed that by our criminal law, if a man conveys land to which he knows he has no title with intent to defraud, it is a penitentiary offence; but where

(a) 4 Kent, 456.

(b) 4 Kent, 457; Patterson's Lessee v. Pease, 5 Ohio, 190; Kingdom v. Nottle, 1 Maule & Selwyn, 355, and 2 Maule & Selwyn, 53; Greenby v. Wilcox, 2 Johns. 1; Hamilton v. Wilson, 4 Johns. 72; Bickford v. Page, 2 Mass. 455; Wyman v. Ballard, 12 Mass. 304; Backus v. McCoy, 3 Ohio, 211; Sprague v. Baker, 17 Mass. 586; King v. Kerr, 5 Ohio, 154; Foote v. Burnet, 10 Ohio, 317, where the whole law of covenants real is fully detailed in the note.

there is no intention to defraud, the mere fact of conveying, does not amount to a warranty of title. The liability of the grantor for the goodness of the title, in conveyances in fee, depends upon the *express* covenants inserted in the deed. I think it may be safely laid down, that unless otherwise provided by statute, there is no such thing as an *implied warranty* (a) of title in fee to real property, unless perhaps, by using the word *give*. Hence the grantee always requires an express covenant, when he means to hold the grantor; and the grantor always gives a *quit claim* deed, when he intends to exempt himself from liability. But in leases for years, the words "*grant and demise*," are held to imply a covenant of title and for quiet enjoyment; and perhaps any other words creating the contract of lease would have the same effect. It follows, then, that the man who purchases land must observe the maxim, *caveat emptor*; and if he means to hold the grantor liable, he must require express covenants. It has been specially provided in several of the states, that the words "grant, bargain and sell," shall amount to a covenant against the acts and incumbrances of the grantor; but we have no such provision; and therefore, however excellent the principle, I presume that even this covenant would not be implied. The *ancient warranty* was a covenant real, whereby the grantor warranted the title, and bound himself, in case of eviction, to furnish other land of equal value. But in this country the ancient warranty has been entirely superseded by specific covenants, of which there are five. 1. That the grantor is lawfully seised:—"And the said ——— [grantor], for himself, his heirs, executors, and administrators, does hereby covenant, promise, and agree, to and with the said ——— [grantee], his heirs, executors, administrators, and assigns, that he is lawfully seised as owner of the premises hereby bargained and sold, or meant and intended so to be." 2. That the grantor has good right to convey:—"And that he has good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid." 3. That the land is free from incumbrances:—"And that the said premises are now free, clear, discharged, and unincumbered of and from all former and other grants, titles, leases, incumbrances, charges, estates, judgments, liens, mortgages, taxes, and assessments of what nature or kind soever." 4. That the grantee shall quietly enjoy:—"And that the said ——— [grantee], his heirs, and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of any person or persons lawfully claiming or to claim the same." 5. That the

(a) *Grannis v. Clark*, 8 Cowen, 36; *Barney v. Keith*, 4 Wend. 502; *Young v. Hargrave*, 7 Ohio, part 2, 63.

grantor will warrant and defend:—"And further that the said ——— [grantor], his heirs, executors, and administrators will warrant and for ever defend the aforesaid premises, with their appurtenances, and every part and parcel thereof, unto the said ——— [grantee], his heirs and assigns, against all persons claiming, or to claim, by, from, or under him, them, or any of them, or by, from, or under any other person or persons whomsoever." The three first of these covenants have usually been considered as personal covenants, operating presently; and the two last, as real covenants, operating prospectively. In fact, a strict analysis would reduce these five covenants to two; one importing a clear title now, and giving an immediate right of action if this be not true; the other looking to the ultimate security of title, and giving a future right of action whenever such title should be actually defeated. Accordingly, the covenant of *seisin*, which is a present covenant, and the covenant of *warranty*, which is a future covenant, are the two most commonly used in our deeds. Very rarely is any other covenant inserted, unless it be the covenant *against incumbrance*, which is also a present covenant. But the tendency of recent decisions is to remove all distinction between present and future covenants, by making them all run with the land, and operate prospectively. The only exception is where the covenantor, at the time of the conveyance, was not in possession claiming title; in which case, the covenant of *seisin* is held to be a present personal covenant, not running with the land, but broken, if at all, as soon as made, and giving an immediate right of action before eviction. With this exception, the three covenants, of *seisin*, of *warranty*, and *against incumbrances*, are real covenants, running with the land. Those of *seisin* and *warranty* give no right of action until eviction. That *against incumbrance* gives no right of action until the incumbrance has been paid off. In all three the measure of damages is the same, namely, the purchase money, with interest and charges of litigation. And this is the case even when the removing of the incumbrance has cost more than the above amount. But the covenants of *seisin* and *warranty* being of such universal importance, I will be a little more explicit respecting them.

The *covenant of seisin*, (*a*) stripped of its surplusage, amounts to this; that the grantor is the lawful owner in fee simple. As this covenant is in the present tense, if the grantor has not the title at the date of the deed, there is a breach of the covenant instantly; whence it has been sometimes held, that the covenant of *seisin* is merely a *personal* covenant, and not a *real* covenant running with the land; and accordingly that the "assigns" of the grantee, though expressly named, cannot avail themselves of

(*a*) *Backus v. McCoy*, 3 Ohio 211; *Spark v. Vangundy*, 3 Ohio, 307; *King v. Kerr*, 5 Ohio, 154; *Day v. Brown*, 2 Ohio, 345.

it, because a personal contract cannot be assigned. This is the doctrine of several of the states. But in this state, the established doctrine with regard to the covenant of seisin, is this: if at the time of executing the deed, the grantor was not *seised either in fact or in law*; that is, if the grantor, or some person claiming under him, was not in actual possession claiming title, the covenant of seisin is broken instantly, and does not pass with the land to the *heirs or assigns* of the grantee: but on the other hand, if the grantor was in possession with claim of title, then this covenant runs with the land, and is not broken until actual *eviction* by a paramount title: in a word, it has in the latter case the same operation as a covenant of warranty: and this is now the English doctrine. The *covenant of warranty*, (a) is an undertaking to indemnify against all existing claims which may in future be presented. It is in express terms made prospective; it runs with the land into whosoever hands it passes, and is not broken until there has been an actual eviction by a paramount title. Where the land has passed through several hands, with covenants of warranty, the last holder may, upon eviction, maintain a separate action against every prior warrantor, or may single out either at his pleasure; but he can obtain only *one* satisfaction, and the person who makes that, can immediately sue either or all those who precede him.

Such being the legal effect of these covenants, we can now ascertain how much of surplusage there is in the forms above given. The grantor expressly names, "his heirs, executors, and administrators." Is this necessary in order to bind them? One would suppose so, from the care taken to insert them; but the fact is, that as a general rule, heirs, devisees, executors and administrators are liable for the debts and undertakings of the deceased, so far as they have *assets*, whether mentioned or not at the contracting of the debt: and there is nothing in the nature of these covenants to distinguish them from other pecuniary obligations: it cannot therefore be necessary in any case to specify them, in order to bind them. Whenever the cause of action by law survives, they are liable without being mentioned, if they have assets: and when it does not by law survive, no words of the deceased could bind them. Again, the grantor covenants "with the grantee, his heirs, executors, administrators, and assigns:" is this necessary in order to extend the benefit of the covenant to them? If the covenant runs with the land, the "heirs and assigns" may take advantage of it without being named, as our court has declared; and if it does not run with the land, they cannot, although named, avail themselves of it; as has

(a) *Innes v. Agnew*, 1 Ohio, 386; *King v. Kerr*, 5 Ohio, 154; *St. Clair v. Williams*, 7 Ohio, part 2, 110; *Day v. Brown*, 2 Ohio, 345; *Bond v. Swearingen*, 1 Ohio, 395; *Douglass v. McCoy*, 5 Ohio, 522; *Allen v. Parish*, 3 Ohio, 107.

been also declared: therefore it can be in no case necessary to mention them: and as to "executors and administrators," if the covenant runs with the land, they cannot sue, although mentioned, and if it does not run with the land, they can sue, though not mentioned, as in case of any other debt or liability due to the deceased. The conclusion then is, that in any of the covenants in a deed, it is sufficient to name the grantor and grantee, without their representatives or assigns. As to the tautology of the words, "promise, covenant, and agree to and with," it is hardly necessary to say that the words, "covenant with," have the same force. So of the expressions, "good right, full power, and lawful authority"—either is as good as all. So the phrase, "every part and parcel thereof," after "appurtenances," is superfluous, because the whole includes every part. And the whole expression, "against all persons claiming or to claim by, from, or under him, them, or any of them, or any other person or persons whomsoever," means no more than "against all claims whatsoever." Accordingly, if all surplusage be left out, these two covenants will run as follows: "and the said grantor does hereby covenant with the said grantee that he is the lawful owner of the said premises, in fee simple; and that he will warrant and defend the title against all future claims."

A deed containing the above covenants is usually called a "*warranty deed*," to distinguish it from a "*quit-claim deed*," which either contains no covenant at all, or only a covenant against the acts of the grantor. This covenant is usually in the following form:—"That the said grantor has not done or suffered any thing whereby the title of the said premises to the said grantee can be frustrated or annulled." To which is sometimes added another, which when abbreviated is as follows:—"And further, that he will warrant and for ever defend the said premises against all persons claiming under him, his heirs, or assigns." The only other difference of form between a quit-claim, and a warranty deed, is in the granting clause, where in the former, the word "quit-claim," or "release," is usually inserted.

In a *lease* there are usually covenants by the lessor and lessee. Those by the lessor are: 1. A covenant to *renew* the lease at the expiration of the term. Without this covenant, the lessor is not bound to renew; and when inserted, it runs with the land, and binds any one who obtains the reversion. 2. A covenant to *repair*. Without this, the lessor is not bound to repair or allow for repairs. But the lessee would be compelled to repair at his own expense, or incur a liability for permissive waste. 3. A covenant for *quiet enjoyment*. Without this, the lessee who should be disturbed during his term, could have no remedy. Those by the lessee are: 1. A covenant to *pay the rent*. Unless there be such a covenant, the lessor can only recover his rent by

an action for use and occupation. But where there is an express covenant to pay, the lessee will be liable, although the premises should be destroyed by fire, or other inevitable accident. 2. A covenant *not to assign or underlet*. Without such a covenant, the lessee may do either, this power being implied where it is not denied, as we have already seen. 3. A covenant to yield possession to the lessor at the expiration of the lease. The only effect of this covenant is to make the lessee answerable in damages for any detention. For the lessor can recover *possession* as speedily without this covenant as with it; but he cannot recover damages. There is also a clause of *re-entry or forfeiture for non-payment* of rent, which is peculiarly necessary in this state, because there is no remedy *by distress*; but there is this nice distinction to be observed. If the proviso be, that upon non-payment by a given day, the *lease shall be void*, no after acceptance of rent will operate as a confirmation. But where the proviso is only for *re-entry*, and the lessor afterwards accepts rent, the breach is cured. And the tenant is not bound to seek the landlord off of the land. The rent must be demanded on the premises; though a personal tender off of the land will be good. I have mentioned that an actual eviction is necessary before proceeding on the covenant. But our court has decided, that where the defendant in ejectment, after judgment against him, claims the benefit of the occupying claimant law, and so is not *actually* evicted, he may nevertheless in this case proceed upon his covenants.

All that has been said on the subject of covenants, applies chiefly to those cases where the owner of the land conveys in *propria persona*. An attorney in fact, may bind his principal by covenants, if expressly authorized so to do by the power. But those agents who derive their authority from the law, as guardians, executors, administrators, insolvent commissioners, sheriffs and auditors, have no authority to bind those whom they represent, and therefore their covenants, if binding at all, would only bind themselves. In such deeds, therefore, covenants are seldom inserted. There is, however, a case, in which executors covenanted "to warrant and defend, as executors are bound by law to do;" and the court held this to be no covenant by them, because they are not bound by law to warrant at all. (a) In the same case, the covenant of seisin contained a *blank*, instead of the name of the party seised, and the court held this covenant void on that account.

In this connexion it is proper to say a word on the subject of *estoppel*. (b) By estoppel is meant that a party is not allowed to

(a) Day v. Brown, 2 Ohio, 345.

(b) See 2 Black. 295; 4 Kent, 97, 254, 440; Bond's Lessee v. Swearingen, 1 Ohio, 411; Jackson v. Stevens, 3 Johns. 316; Allen's Lessee v. Parish, 3 Ohio, 116; Patterson's Lessee v. Pease, 5 Ohio, 190; Hill v. West, 8 Ohio, 222.

contradict what he has agreed to under seal. The doctrine of estoppel is confined to instruments under seal, on account of the *theoretical* solemnity attending their execution. By the effect of estoppel, if a man who has no interest at the time, or only an equitable interest, makes a conveyance, and afterwards obtains the legal title, this relates back to supply the prior conveyance, and enures to the benefit of the grantor or his assigns. For though the original deed conveyed nothing at the time, the grantor is estopped from averring that fact; and so are his heirs and all persons claiming under him. The case would be the same, if the legal title had been acquired after the death of the grantor. But the estoppel of the heirs, and other representatives of the grantor, depends upon the fact whether the deed contains covenants of title. If the heirs should recover against their ancestor's grantee, on the ground that the ancestor had no title at the time of conveying, and that deed contained a warranty, the grantee might immediately turn round and sue the heirs on the covenant; and it is to avoid this circuitry of action, that the heirs of the ancestor are estopped, whenever his deed contains a covenant of warranty. But no deed will operate by estoppel, unless it be executed with all the legal formalities; and accordingly where an instrument, intended for a deed, and containing a covenant of title, had but one subscribing witness, it was held not to estop the heirs of the grantor, under the law of this state.

Conclusion and attestation. (a) The conclusion of the deed is in these words. "In witness whereof the said grantor has hereunto set his hand and seal, this ——— day of ——— in the year ———." But I presume the signature and seal would be sufficient without any *concluding words* averring the fact. Their presence would speak for themselves. Whether the signatures of the two witnesses alone would be sufficient without any *attesting words*, is doubtful, for the statute requires the signing and sealing to be done or acknowledged "in the presence of two witnesses, who shall attest such signing and sealing, and subscribe their names *to such attestation.*" But the fact of delivery need not appear in the attestation, because the statute does not require it. If there be any erasures, alterations, or interlineations, a memorandum should be made of them in the attesting clause, to show that they were done with the consent of parties; for any material alteration of a deed by one party, after the execution, and without the consent of the other, destroys it. And the most convenient proof of the time and manner of making the alterations, is by this memorandum, though undoubtedly other proof would be admitted.

A *mortgage* follows in every respect the common form of a

(a) *Smith v. Crooker*, 5 Mass. 538; *Hurst v. Adams*, 6 Mass. 519; *Hatch v. Hatch*, 9 Mass. 307; *Courcier v. Graham*, 1 Ohio, 330; *Patterson v. Pease*, 5 Ohio, 190.

deed, with the addition of a *clause of defeasance*, immediately before the *conclusion*. This clause, when abbreviated according to the foregoing principles, may be in the following words: "Provided nevertheless, that if the said *mortgagor* shall pay to the said *mortgagee*, the sum of _____ dollars, on the _____ day of _____, in the year _____, according to a promissory note of this date, then, this mortgage is to be void." If there be a power of attorney to sell, it is inserted immediately after this clause of defeasance. We have already seen that the construction put upon a mortgage is far different from what its language imports; and for this reason, its form ought to be so altered as to contain the precise stipulations which the law implies; but a still greater improvement would be to provide by law, that an instrument of the following form, duly executed and recorded, should have the force and effect of a mortgage: "I, A. B. do hereby mortgage to C. D. the following real estate, to which I warrant the title, viz. _____; to secure the payment of _____ dollars, due on the _____, according to my note of the same tenor and date. Witness my hand and seal," &c. Why would not this answer every purpose?

Certificate of acknowledgment. The nature of an acknowledgment having been before considered, it only remains to consider the form of the certificate; which is usually as follows: "The state of _____, county of _____. Before me _____, a _____ of said _____, personally appeared _____ the above named grantor, and acknowledged the signing and sealing of the above deed, as his voluntary act. Witness my hand," &c. But where the wife joins her husband, the following addition must be made: "And the said _____, wife of the said _____, being examined by me separate and apart from her husband, and the contents of the above deed being explained to her, declared that she did voluntarily sign, seal and acknowledge the same, and is still satisfied therewith. Witness my hand," &c.

In concluding my remarks on the form of deeds, I will merely observe that there are three arguments in favor of observing set forms. *First*, the legal effect of *words* is thereby settled; *secondly*, the instrument is more readily drawn, and with less liability to mistake; and *thirdly*, we can more readily refer to any particular part. For these reasons, I am in favor of established forms; but every consideration shows that these forms ought to be as concise as possible; and I hope that the somewhat minute examination I have given, establishes the fact that the customary prolixity which I have exposed, in the common form of deeds is an abuse worth reforming. And when we consider the whole number of deeds made annually in the United States, and all required to be recorded, it will be conceded that this single reform would produce in the aggregate, an immense saving of time, material, and expense. What then would be the

result, if a similar reform were effected in regard to all legal forms and instruments? But it is time to leave the subject of title by purchase. I have made the lecture a very long one, on account of its great practical importance. I trust I have sufficiently proved the truth of the remark made in the beginning, that much improvement has been made in this branch of law, and that there is room for much more. In a matter of such universal interest as the transfer of property, whether real or personal, there is peculiar reason for endeavoring to attain the utmost degree of simplicity and brevity. We have improved our law in both these respects; but wise legislation might go much further. With regard to transfers of realty, the two great points to be regarded, are certainty and notoriety. Whatever forms and ceremonies conduce to these ends, are salutary and ought to be retained; all beyond are worse than useless, and ought to be abolished. On the subject of personalty, there is less fault to find. This part of the law is simple enough. If it be defective in any respect, it is in the want of certainty, with the single exception of a ship or steam boat; but I reserve remarks on this subject, till we come to the contract of sale.

LECTURE XXXII.

CONTRACTS IN GENERAL. (a)

§ 174. *What constitutes a contract.* To complete our view of the law of property, it only remains that we examine the law of contracts. I have already spoken of the constitutional guaranty which secures existing contracts against being impaired by legislation; and on this important provision, I have nothing now to add to the views then presented, though hardly any language would be too strong, in commendation of its utility. In this lecture I am to consider the general law of contracts; and in the next, the law regulating particular classes of contracts; and I desire, at the outset, to impress you strongly with a feeling of the practical importance of this division of law, not merely to the professional man, but to every citizen. Nearly all the business

(a) See 2 Black. chap. 30; 2 Kent, lec. 38, 39, 40; 1 Dane's Abr. chap. 1. The treatises of Story, Comyn, Powell, Chitty, Pothier, and Newland, the latter on Contracts as regarded in Equity. See also title Contracts, in any of the Digests or Abridgments.

transactions of life have some connection with contracts. Even our currency is chiefly made up of contracts, in the shape of bank notes. A large proportion of the wealth of every man consists of contracts. In short, few of us pass a single day, without having something to do with contracts. The outline, therefore, of the law of contracts, should be in the mind of every person pretending to business qualifications; and this is all I shall undertake to exhibit. Writers have given various definitions of a contract, of which I shall quote but three. Blackstone says it is "an agreement upon sufficient consideration, to do or not to do a particular thing." Powell says it is "a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other." The French definition, taken from the civil law is, "a convention by which one or more persons obligate themselves to one or more other persons, to give, or to do, or not to do something." It makes little difference which of these definitions we adopt. The effect of every valid contract is to create reciprocal rights and obligations. A distinction is, however, made between *executed* and *executory* contracts. Thus if I agree to deliver property to you, and forthwith deliver it, this is an *executed* contract on my part; and the effect is to convey to you *something in possession*. But if you do not, at the time, pay the price agreed, the contract so to do is *executory* on your part; and as I may be compelled to resort to an action against you to enforce payment, the effect is to give me a *right of action*. Hence the interest of a party in an executory contract is technically called *a thing or chose in action*. The remedy which a party has, in case of non-performance by the other party, is twofold. By a suit at law, he may in all cases recover damages; and by a suit in chancery he may in many cases, compel specific performance. But these points are explained elsewhere. In thus describing the effect of a contract, I have presupposed its legal sufficiency or validity; but according to the foregoing definitions, this must depend upon three things; namely, the *consideration*, the *parties*, and the *subject-matter*. I shall speak of these in their order.

§ 175. *Consideration.* (a) We have seen that Blackstone makes a "*sufficient consideration*" part of the definition of a contract. In fact this is what distinguishes a *contract*, in legal contemplation, from a mere *promise*. An agreement without any consideration, is called, in law language, a *nudum pactum* or naked promise, which the law will not recognize. But what is meant by a consideration, in this technical sense, will be best understood by an illustration. Thus, if I promise to do something for you, without your having done or promising to do any thing for me in return, there is no motive or consideration for my promise. The benefit

is all on your side, and the burthen all on mine, without any mutuality or reciprocity. If I fail to perform, you suffer no *damage*; but remain in the same condition as before the promise was made. Hence, though I may be *morally bound* to perform, yet the law will neither enforce performance, nor give damages for nonperformance. But if, on the other hand, my promise to you is based upon something done or to be done by you for me, which will either benefit me or incommode you, there is then a consideration for my promise, which converts it into a contract, and makes it binding in law. There is now a mutuality, and each party may call upon the other to perform his part, or pay damages for nonperformance. But we must take care not to confound a consideration with an *equivalent*, as we are at first apt to do. The law does not require that what you do or agree to do for me, shall be the same in kind or equal in value, with what I agree to do for you. It merely requires that something be done or suffered on your part, as an inducement to my undertaking, and a foundation for damages in case of my failure, which something we call a consideration; and it makes no difference whether it be beneficial to me or some other person not a party, or merely prejudicial to you; for in either case it will be a sufficient consideration. The general idea is, that a consideration must be something by which one party is to gain, or the other to lose, in a *pecuniary sense*; as the payment of money, performance of work, delivery of property, forbearance to sue, and the like. But this is not always the case; for a *moral obligation* alone is held sufficient to support an express promise, though not to raise an implied promise. Thus, if an adult person promises to pay a debt contracted during infancy; or if any person promise to pay a debt barred by the statute of limitations, or bankruptcy; such promise will bind him, though there was no existing legal obligation. The rule then is, that a moral obligation, founded on a once existing legal obligation, will support an express promise. *Marriage* also is a sufficient consideration to support a promise predicated upon it, though not necessarily a valuable one. But *natural affection* among kindred is not. A consideration which is *impossible*, will not support a contract; nor will the law uphold one which is *illegal* or *immoral*, as will be seen hereafter. Considerations are of three kinds; namely, *executed*, *executory* and *concurrent*. An *executed* consideration is something done before making the promise; and the rule is, that such consideration will not be sufficient, unless induced by the previous request of the other party, or there be a subsequent new consideration. Thus, if I promise you to pay a debt *already due* by another, this promise is not binding, because the consideration is past; but if I first request you to trust him, promising to see the debt paid, the promise is binding; and so it is, if, upon the strength of it, you agree not to sue him; for this forbearance is a new consideration.

An *executory* consideration is something to be performed before the other party can be required to perform. This is called a *condition precedent*, and performance must be done or tendered to make the contract binding on the other party. Thus, if I agree to do so much work for so much money, I must perform the work, or offer to perform it, before I can claim the compensation. A *concurrent* consideration is where there are mutual engagements to be performed *at the same time*, as in the case of marriage; and here, as neither party can perform without the other, a tender of performance is sufficient. The principal exceptions to the necessity of a consideration were formerly two, namely, contracts under seal, and negotiable contracts, after being negotiated. I shall speak of these hereafter. For the present it is sufficient to say, that we have a statutory provision authorizing a total or partial failure of consideration to be set up in defence to all written contracts, whether under seal or not, except negotiable contracts after being negotiated.

Gifts. (a) In this connexion I will say a word respecting gifts. Every competent person has an undoubted right to give his property to whom he pleases, provided he do not thereby injure his creditors. And although a promise to give is not binding, for want of a consideration, yet a gift perfected is irrevocable by the giver; and to perfect a gift, there must in all cases be an actual delivery of the thing given, if it be such as to admit of actual delivery. This is equally true of gifts *inter vivos*, between the living, and gifts *causa mortis*, in anticipation of death. But the latter differ from the former in this, that being made in anticipation of death, if the giver recover, the condition of the gift fails, and he may reclaim the thing given. This species of gift differs from a nuncupative will, in two respects. The forms are dispensed with, and there is an actual delivery. But courts are inclined to watch such gifts with great caution, and require very clear evidence to support them.

§ 176. *Parties.* The general rule is, that all persons are capable of contracting. But there are several exceptions, all but one of which are founded on the actual or presumed want of mental capacity. The very idea of a contract supposes the *assent of mind* on each side. The term *agreement*, which is nearly synonymous with contract, has been supposed to be formed of two words, *aggregatio mentium*, which express this idea. The parties then must be capable of giving an intelligent consent. But a want of capacity may arise either from *actual destitution* of reason, or from such *constraint*, as prevents its free action; and hence *insane persons, drunkards, infants, married women, and persons under duress*, are placed under a total or partial dis-

(a) See 2 Kent, 436.

ability. *Alien enemies* are likewise disabled, on the ground of public policy. I shall speak of these six classes in their order.

Insane persons, (a) whether *idiots* or *lunatics*, as we have seen, are incapable of contracting during the disability. On this ground guardians are appointed to manage their concerns. But sanity is always presumed until insanity has once been established; after which, the continuance of insanity is presumed until the contrary has been proved. And the decision of an inquest, under our statute, is not conclusive, when a contract is in question. The fact still remains open to contest. The old doctrine, that a man cannot be permitted to stultify himself, that is, to set up the defence of insanity, is now exploded. As to idiots, the test is incapacity of understanding and acting in the ordinary affairs of life. Mere mental imbecility, not reaching this point, will not invalidate a contract fairly made.

Drunkards, although formerly held liable, both in law and equity, to perform their contracts, unless the intoxication were procured by the other party, are now regarded with more favor. Courts have lately inclined to consider a contract, made by a person so drunk as not to have the use of his reason, as void, though the intoxication was voluntary, and there was no actual fraud on the other side.

Infants, (b) as we have seen, are only partially disqualified from contracting. They are held bound by contracts made for *necessaries*, suited to their age and condition; and their other contracts are *voidable* only, and not absolutely *void*. They may be ratified by assent after becoming of age. But infancy is a personal privilege of the infant, and the other party cannot take advantage of it. If beneficial to the infant, the contract will be enforced against the adult; and this is perhaps the only case in which the obligation is not mutual. Prudence therefore dictates that dealings where infants are concerned, should be conducted with their guardians. As to real property, this is indispensable; for infants cannot convey at all; and guardians, as we have seen, can only convey with leave of court.

Married women, (c) as a general rule, are utterly disqualified for making any contract whatsoever. Their contracts, as we have seen, are held to be absolutely void, to all intents and purposes. Even when living separately from their husbands, they cannot bind themselves for necessities; and for this reason their husbands are made liable. The only exception is, where the statute allows married women to join with their husbands in conveyances of land.

Persons under duress, whether from actual violence, or the threat thereof, are not bound by contracts made during such

(a) Ante § 112.

(b) Ante § 111.

(c) Ante § 104.

duress. There have been many nice distinctions as to what constitutes duress; but they result in this general principle, that if the contract be made from a reasonable apprehension of violence or constraint, it will not be binding, because the mind does not act freely.

Aliens, while their country is at war with ours, are prohibited, as we have seen, from contracting with our citizens, on grounds of public policy, unless by special license from government. The theory is, that when two nations are at war, all the individuals are at war with each other. The fact we know to be different; but the rule still continues.

§ 177. *Subject matter.* The general rule is, that parties may contract about whatsoever they choose; but there are several exceptions founded on reasons of public policy. The law will not uphold a contract, when the subject matter is prejudicial to the general welfare. On this ground four classes of contracts are held to be invalid; namely, contracts which are *immoral, impolitic, fraudulent, and illegal*. I shall consider these in their order.

Immoral contracts. Where the undertaking on either side is to do or permit something decidedly immoral, as prostitution, making indecent books or pictures, and the like, the law will not aid either party in enforcing performance. The immorality, however, must be of a marked character; for the law does not observe a fastidious delicacy. On nice points, parties are left to their own moral sense. This is merely an application of the principle of non-interference, and does not militate against the doctrine before advanced, that questions of abstract morality are beyond the scope of human laws. The law simply refuses its aid in the enforcement of immoral contracts. But the question of morality is not always open to discussion. In general, only those contracts are held void for immorality, which the precedents have settled to be immoral.

Contracts against public policy. Where the subject matter of a contract is in opposition to public policy, this is a sufficient reason for refusing to enforce it. On this ground a contract in restraint of trade or marriage, or tending to stifle or prevent a criminal prosecution, or to induce an officer to swerve from his duty, will not be enforced. These examples sufficiently illustrate the idea. But you are not to suppose that the question, what is public policy, is always open for discussion whenever a contract is sought to be enforced. This would be to convert the court into an arena for party politics. It is only in those cases which the consent of ages has settled to be against public policy, that the defence is now admitted. What is public policy, has thus become a question of precedent, not depending upon the varying opinions of different judges.

Fraudulent contracts. (a) It is a general rule both in law and equity, that fraud vitiates every contract into which it enters. Fraud signifies any kind of artifice, surprise, trick, dissembling, misrepresentation, concealment, or deceit, by which the parties or third persons are cheated or deceived. The varieties of fraud are so great, that it is difficult to lay down any specific rules concerning it, without occupying too much space; I shall briefly consider the subject in two points of view; first, with reference to the *parties*; and secondly, with reference to *third persons*, particularly as provided against in the statute of frauds.

Fraud between the parties. The law requires that when parties are about to enter into a contract, neither shall misrepresent or conceal any material fact upon which it is predicated. It is as clearly fraudulent to suppress truth, as to assert falsehood, because deception is equally the result. But here a distinction is to be noted. Intentional misrepresentation is always fraudulent. But there may be intentional concealment which is not fraudulent. The point is to determine what kind of knowledge a contracting party may lawfully keep to himself. And the best rule I can lay down is this. If you have any peculiar or extraordinary information, which the other party, exercising ordinary knowledge and diligence, cannot be presumed to have, you are bound to disclose it; and the concealment of it will be a fraud. Thus while the law requires a full and fair disclosure of all the facts necessary to enable each party to make up his mind, the rule has a reasonable construction. The law will not relieve against the common inequalities of knowledge, judgment, skill, and experience. It does not discountenance speculation and enterprise, by requiring bargains to be perfectly equal. It allows one party to obtain the advantage, when there is no positive unfairness. Accordingly slight inadequacy of consideration, or ignorance of the subject matter, or mental imbecility not amounting to idiocy or insanity, will not of themselves, avoid a contract. So in regard to the quality and value of articles contracted for, the rule is, that if a defect be open and obvious to common inspection, there can be no ground to complain of fraud. But when the defect is latent and not readily perceived, the party knowing it, is bound to make disclosure. When a contract has been absolutely concluded, neither party can alter it, without the consent of the other, in any essential part, without avoiding it altogether. As a general rule, if any part of one entire contract is fraudulent, it is void throughout. Courts of law will not undertake to apportion fraud. This can only be done by courts of equity, whose jurisdiction of fraud will be considered hereafter.

(a) See Roberts on Frauds; Roberts on Fraudulent Conveyances; Hovenden on Frauds; and the various Digests, title fraud.

The statute of frauds. (a) Fraud with respect to third persons, is chiefly provided against by the "*act for the prevention of frauds and perjuries*," commonly called the statute of frauds. Our present act was passed in 1810, prior to which we had no provisions on the subject. It is copied with some variations from the English statutes of the 13th and 27th of Elizabeth, and the 29th of Charles the Second. It consists of five sections, and in this connection I shall remark upon them all, though the last three might be reserved until I come to speak of written contracts.

First section. "That all deeds of gifts, and conveyances of goods and chattels, made in trust, for the use of the person making the same, shall be void and of no effect." This section, it will be observed, is confined to personal property only. As a general rule, the possession of personal property is regarded as evidence of ownership. Among business men, credit is ordinarily given upon the mere fact of such possession, without further inquiry; and hence this provision of the statute. It prohibits persons from putting such property out of their hands, while they still retain the beneficial interest, by having it held for their own use. It is obvious that there can seldom be any other motive, than fraud upon third persons, for such a nominal transfer. Why should I suffer you to hold my property for my use, if it be not either to defraud my creditors, or to enable you to defraud yours? But as this section is probably included in the next, I will not make further comment upon it.

Second section. "That every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment, or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void, and of no effect." The substance of this provision is, that every conveyance or incumbrance of real or personal property, made with intent to defraud *creditors* or *purchasers* is void. Its design is twofold; first, to give legal efficacy to the grand principle, that all the property which a debtor has, shall be responsible for his debts; and secondly, to promote honesty and fair dealing between vendors and purchasers. I shall make some general remarks upon both of these heads.

As to creditors. (b) The words are, "with intent to defraud." It is seldom possible to prove such intent by positive testimony,

^{*} (a) *Burgett v. Burgett*, 1 Ohio, 469; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Barr v. Hatch*, 3 Ohio, 527; *Atkinson v. Jordan*, 5 Ohio, 289.

(b) *Starr v. Starr*, 1 Ohio, 321; *Hood v. Brown*, 2 Ohio, 271; *Bond v. Swearingen*, 1 Ohio, 395; *Barr v. Hatch*, 3 Ohio, 527; *Burgett v. Burgett*, 1 Ohio, 469; *Bryce v. Myers*, 5 Ohio, 121; *Hombeck v. Van Matre*, 9 Ohio, 153; *Douglass v. Dunlap*, 10 Ohio, 162.

because no man can look into the heart of another; and hence the law resorts to presumptions. If, for example, a fraud has been actually committed, the intent will always be presumed. And in relation to creditors, one of the strongest grounds for presuming fraud, is the want of *consideration*. It is fair to conclude that when a man who is in debt, disposes of his property for much less than it is worth, there is a secret understanding between him and the purchaser, by which creditors are to be defrauded. Indeed, this collusion may take place, when the full value is paid; for if the object be to convert property into money for the purpose of secreting it, and this be known to the purchaser, he becomes a party to the fraud, and must suffer the consequences. But in the absence of collusion, if a debtor receives the fair value of his property, the conveyance will be good; for it does not render him the less able to pay his debts. The corresponding section of the English statute, expressly excepts conveyances made in good faith, and for a valuable consideration; and though there is no such exception in ours, yet there is no doubt our courts would make it, for the plain reason that the presumption of a fraudulent intent is thereby rebutted. But questions of this kind most frequently arise upon conveyances made in consideration of natural *affection*, which is never deemed a valuable consideration, though good as between the parties. On this subject our courts lay down the reasonable doctrine, that a conveyance to a child, by a parent who was indebted at the time, is presumptive evidence of fraud; but this presumption may be rebutted, by showing that the parent was in prosperous circumstances, and not embarrassed; that his debts were small, and sufficient property was retained to pay them; and that the gift was no more than a reasonable provision for the child. Other circumstances which create presumptions of fraud as to creditors are, that the conveyance was made when a judgment was expected against the debtor; that he remained in possession after the conveyance; that there was an agreement to reconvey at a future time, if the grantee should so wish; and the like. But all these presumptions may be rebutted, by proving the actual honesty of the transaction. There has been much controversy upon the question, how far an *insolvent debtor* (a) can give one creditor a *preference* over another. Our court has held that an *actual conveyance or transfer*, for a fair value, in payment of a preferred debt, is not within the statute, being no fraud upon other creditors; but that a *general assignment* to trustees for the purpose of preferring creditors, is to be watched with great jealousy. In fact, the opinion has been rapidly gaining ground, that an equal distribution ought to be made among all

(a) *Atkinson v. Jordan*, 5 Ohio, 293; *Replier v. Orrick*, 7 Ohio, part 2, 246; *Stephenson v. Agry*, 7 Ohio, part 2, 247; *Hull v. Jeffry*, 8 Ohio, 390; *Harshman v. Lowe*, 9 Ohio, 92; *Mitchell v. Gazzam*, 12 Ohio, 315.

the creditors of a living, as much as of a deceased insolvent debtor. Preferences are certainly inequitable, if not actually fraudulent. But in this state, all doubt is now removed by our statute, which declares, "that all assignments of property in trust, which shall be made by debtors to trustees in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands; and such trusts shall be subject to the control of chancery, as in other cases." Henceforward, therefore, if an insolvent debtor desires to prefer a creditor, he must do it by an actual payment to him, in money or other property.

As to purchasers. The purchasers who are protected by the statute, are those who have purchased in good faith. Thus if I have purchased property of you, and before delivery of possession, you convey it to some one else who knew of my purchase, this conveyance will be fraudulent as to me: but if he knew nothing of my right, and purchased in good faith, and for an actual consideration, he will be protected, as an innocent purchaser without notice. But in such case, there are conflicting opinions as to whether the payment of an antecedent debt, is such a consideration as will protect the subsequent purchaser, because he parts with nothing new. (a) Again, if you convey land by deed to me, and I omit to record the deed, for the purpose of enabling you to make a sale to some one else, my collusion with you makes the conveyance to me void; but if I merely retain the deed for the six months allowed before recording, without any knowledge of your subsequent sale, my title will be good: from which it follows, that in order to invalidate a conveyance on the ground of fraud, as to another purchaser, there must be collusion between the grantor and that purchaser whose conveyance is to be set aside. The fraudulent conveyance described in the statute is said to be "utterly void and of no effect." In the corresponding section of the English statute, such conveyance is declared void only as to the persons intended to be defrauded, namely, creditors and purchasers. As to the fraudulent grantor himself and all strangers to the transaction, the conveyance is binding: and our court has decided that this is the true construction of our statute, and that none but creditors and purchasers can impeach the conveyance. To allow the grantor to take advantage of his own wrong, would promote fraud, instead of preventing it: and to allow strangers, not affected by the transaction, to take advantage of it, would encourage an officious intermeddling with what does not concern them.

(a) *Lupin v. Marie*, 2 Paige Chy. Rep. 169; *Dickerson v. Tillinghamst*, 4 Paige, 215; *Lloyd v. Brewster*, 4 Paige, 537; *Riley v. Johnson*, 8 Ohio, 526; *Swift v. Tyson*, 16 Peters, 1; *Bank of Sandusky v. Scoville*, 24 Wend. 115.

Third section. "That where any loan of goods and chattels shall be pretended to have been made to any person, with whom or those claiming under him, possession shall have remained for the space of five years, such goods and chattels shall be deemed the property of the person having had such possession, unless a reservation of the right to such goods and chattels, shall have been made to the lender in writing, and such writing shall have been recorded within six months from the time of making such loan, in the recorder's office of the county, where one or both of the parties shall then have resided." The substance of this provision is, that where personal property under color of loan, has been suffered to remain in the possession of another for five years, the lender shall lose his title thereto, unless a written reservation of his right, was made and recorded within six months after the lending. There is no such provision in the English statute, and we have no decision upon it. The intention, probably, is not to interfere between the lender and borrower, but to protect the interests of creditors against the concealment of property by the real owner, under pretence of loan. To prevent such deception, the owner who is not in possession, is required to place the evidence of ownership on record as notice to the world: but the time is made so long as to defeat the object in a great measure: the tendency is rather to promote than prevent fraud. We are accustomed to regard the person whom we find in the possession of personalty, as the owner, and to credit him as such. But this provision would seem, by implication, to allow a man, at any time within five years after parting with possession, without any record, to assert his ownership, to the injury of those who had been induced to treat the borrower as owner. Perhaps the best provision on this subject, would be to require, that he who would claim, as against third persons, the ownership of personalty, which he had suffered to remain for six months in the possession of another, should produce recorded evidence of his ownership, made within that length of time, after the possession and ownership were severed.

Fourth section. (a) "That no leases, estates, or interests, either of freeholds or terms for years, or any uncertain interests of, in, or out of lands, tenements, or hereditaments, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law." The substance of this provision is, that no interest whatsoever in real property shall be conveyed by one person to another without a written instrument of conveyance;

(a) *Fleming v. Donahoe*, 5 Ohio, 255; *Reed v. M'Grew*, 5 Ohio, 385; *Paine v. French*, 4 Ohio, 320; *Wilber v. Paine*, 1 Ohio, 251; *Moore v. Beasley*, 3 Ohio, 294; *Lindsey v. Coates*, 1 Ohio, 243; *Sites v. Keller*, 6 Ohio, 483; *Pollard v. Kenner*, 6 Ohio, 528; *Shotwell v. Sedam*, 3 Ohio, 5; *Smiley v. Wright*, 2 Ohio, 506.

and where the conveyance is made by the agent of the owner, the authority to convey must also be in writing. The design is to prevent perjury and fraud in proving title to realty. As to personalty, it can be transferred from hand to hand by mere delivery. This was expressly declared in the ordinance of 1787, and is a part of the common law of the world. But realty cannot change its place like personalty; and something else is required to mark a change of ownership. The statute declares that this shall be written evidence. In speaking of deeds and wills, we have already seen that these instruments of conveyance must not only be in writing, but must also be executed with many formalities. This provision however is silent as to the form of the instrument; it only requires that it be in writing: and even to this requisition, there are some apparent exceptions. *Implied or resulting trusts* in real estate, as we have seen, are not within it: their very nature requires them to be excepted; since to require them to be in writing, would be to annihilate them. It has also been held that a *certificate of entry* under the land laws of the United States may be transferred by parol; because this is not an assignment of the interest in the land, but merely of a prior right to acquire an interest. Again, it has been held that a mortgage may be transferred by mere delivery, if the debt secured by it is at the same time duly assigned; because the interest of a mortgagee is but a chattel interest.

Fifth section. (a) "That no action shall be brought, whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage, of another person; or to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." The substance of this provision is, that upon the five classes of contracts enumerated, no action shall be brought, unless they have been reduced to writing and signed by the party or his authorized agent. It will be observed that under this section, the authority of the agent is not, as under the preceding, required to be in writing; but only the contract itself. The agent must be *lawfully* authorized; and what will constitute a lawful authority is to be gathered from the law of principal and agent. It is settled, how-

(a) Chitty on Contracts, 212; Hoover v. Morris, 3 Ohio, 56; Anderson v. Harold, 10 Ohio, 399.

ever, that one party to the contract cannot sign as agent for the other; but that an auctioneer is an agent for both parties. As to the *signature*, it is sufficient if the name be written with ink or pencil by the party himself in any part of the contract; and if he be in the habit of printing it, this will be sufficient. But the question of greatest difficulty has been, whether the *consideration* (*a*) of the contract must be stated in writing. It is admitted that the statute does not require a formal agreement, drawn up with technical precision; but in England and in New York it has been held that the consideration must be expressed. In Massachusetts the contrary has been held. In Ohio the question was once raised, but not decided. The phrase, "some memorandum or note thereof," would seem to indicate that the consideration may be omitted; and the reason of the law would lead to the same conclusion; for perjury would be as effectually prevented in one way as in the other: but in this state we must wait for a decision. With these general explanations, I shall take up each of the five classes of contracts above enumerated, and make such remarks as may seem necessary; first observing that the phraseology is the same, word for word, as in the English statute.

1. "Any special promise to answer for the debt, default, or miscarriage of another person." This language describes what is technically called a *guaranty*; which is, where one person becomes responsible for the debt of another, without making it his own. The criterion is, that the undertaking is for the debt of another; it is collateral and not original. Hence, if you come with your friend to buy goods of me, saying you will be responsible, and I deliver the goods to him, giving the credit to you; your verbal promise will be sufficient, because you make the debt your own in the first instance. But if you had told me to charge the goods to him, and if he did not pay, you would; this promise would not bind you unless in writing.

2. "Any special promise by an executor or administrator to answer damages out of his own estate." An executor or administrator, as such, is, of course, not personally liable for the debts of the deceased, beyond the amount of assets. If, therefore, he become so liable, it must be by his own special undertaking. And this provision requires such undertaking to be in writing, and so expressed as to create a personal liability.

3. "Any agreement made upon consideration of marriage." It has been decided that this does not include mutual promises to marry, but only agreements to pay money or perform some other collateral act in consideration of marriage: therefore an action may be brought for the breach of a verbal promise to marry.

4. "Any contract or sale of lands, tenements or hereditaments,

(a) *Wain v. Warlters*, 5 East, 10; *Sears v. Brink*, 3 Johns. 210; *Packard v. Richardson*, 17 Mass. 122.

or any interest in or concerning them." At first view, this provision might seem to be included in the fourth section; but there are the following differences: *first*, that relates to conveyances only; this includes all contracts concerning realty, as for example, a contract to convey: *secondly*, there, an agent must be authorized by writing; here, he is merely required to be lawfully authorized: *thirdly*, there the instrument of conveyance must be in writing; here a note or memorandum is sufficient: *fourthly*, there the conveyance is declared to be absolutely void; here, it is merely declared that no action shall be brought against the party. Since, however, every conveyance is a contract executed, it follows that this section would include all those cases under the fourth, where an action should be brought on the instrument of conveyance against a party thereto; so that covenants in deeds or leases are equally within both sections. The provision now in question has been held to embrace a contract for the produce of land *while growing*, but not *when severed*. Also an agreement to take lodgings at a future day. A sale of land at auction is also within it, but the auctioneer is held to be the agent of both parties, and his memorandum complies with the statute. In fact, it may be laid down as a general rule, that any executory contract in relation to realty, must be in writing and signed.

5. "Any agreement that is not to be performed within one year from the making thereof." The word "performed" here means *completed*. An inchoate performance, or partial execution to take place within the year, leaving something to be done after the year, will not take the case out of the statute. Thus a contract for a year's service, to commence at a future day, must be in writing. But a contract to deliver goods within a year, to be paid for after a year, may be verbal, because on one side the performance is all to be within the time; and the statute does not include contracts which *may* be performed within the time, or may reach beyond, depending on a contingency. Thus, a contract to pay money on the arrival of a ship, or the acquisition of a legacy, may be verbal.

I have thus examined each of the five classes of contracts enumerated in the fifth section. But in construing them, courts have always observed that the object of the statute is to prevent fraud as well as perjury; and have accordingly held that *part-performance*, (a) or performance on one side, takes a case out of the statute. The doctrine is, that if one of the parties to a verbal contract within the statute, has honestly performed his part, the other shall not set up the statute to avoid performance on his part, because this would make the statute an instrument of fraud. Thus, if I put you into the possession of land, upon a verbal agreement, that if you make certain improvements you shall

(a) Wilber v. Paine, 1 Ohio, 253; Moore v. Beasley, 3 Ohio, 294.

occupy rent free for a certain period, and you make the improvements, I cannot turn you out within the period; and on the other hand, if you have occupied my land under a verbal agreement to pay rent, you cannot refuse to pay rent, because the contract was not in writing. But the mere payment of money is not such part performance as takes the case out of the statute. Accordingly, if I verbally agree to sell and convey land to you, and you pay the purchase money, you cannot compel me to make the conveyance. You can only abandon the contract, and recover back the money. The English statute contains one provision relative to the sale of goods exceeding ten pounds in value, which is not in ours; namely that a contract for such sale shall not be valid, unless, *first*, the buyer actually receive some part of the goods; or, *secondly*, pay something by way of earnest to bind the bargain; or, *thirdly*, unless the contract be in writing. If we had some such provision, it would tend to prevent much doubt and litigation.

Illegal contracts. (a) By illegal contracts is here meant, not those which lack some of the legal requisites of a valid contract; but those, the subject matter of which is in contravention of some positive law. The general principle is, that if a statute forbids an act to be done, or provides a penalty for doing it, any contract to do such act is invalid, whether the statute declare so or not. Courts of law will not aid parties, who contract to infringe the law. A contract, therefore, to commit any of the crimes, offences, or immoral practices, specified in our criminal code, could not be enforced; although there is no such express declaration. Our statute for the prevention of gaming, declares all contracts to be absolutely void, when any part of the consideration is money or other property, won, lost, staked or betted upon any game or wager whatsoever; or lent to another for that purpose. The language is so broad as to cover every species of gaming contract, under whatsoever name it may be designated. Even negotiable contracts are, in this one instance, void after being negotiated.

Usury. (b) In England, and in most of the states, *usurious contracts* have also been prohibited. *Usury* signifies the taking of greater interest than the law allows. It has been the policy of most nations to limit the rate of interest, and prohibit the taking of more, by declaring the entire contract void, and sometimes by severe penalties; but public sentiment has been gradually in-

(a) See *Spurgeon v. M'Elvaine*, 6 Ohio, 442; *Clark v. Protection Insurance Company*, 1 Story's Rep. 109; *DeBegniss v. Armistead*, 10 Bing. 107; *General Insurance Company v. Belt*, 1 West. Law Jour. 261.

(b) 2 Black. 454; An English Treatise on Usury, by Comyn; *La Fayette Society v. Lewis*, 7 Ohio, 80; *Reddish v. Watson*, 6 Ohio, 510; *Brockway v. Clark, Wright*, 727; *State of Ohio v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Creed v. Commercial Bank*, 11 Ohio, 489; *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; *Baggs v. Louderback*, 12 Ohio, 153.

clining in favor of a more liberal policy. It is undoubtedly convenient to fix the rate of interest for those cases where the parties make no contract on the subject. But if it were now proposed, for the first time, to prohibit men from contracting for what rate they please, we should probably with one voice oppose such a measure, as an arbitrary interference with our personal liberty. We cannot easily perceive why the *price* to be paid for the use of money should be regulated by law, when the price of every other commodity is allowed to regulate itself, upon the principle of fair and free competition; and as to *value*, all agree that it cannot be regulated by law. A thing is worth what men will give for it, let the law declare what it will. Besides the actual value of money to a given person, at a given time and place, depends upon circumstances, which the individual himself only can appreciate. Nothing is more variable and fluctuating. It is said however that the necessitous and the improvident must be protected against extortion. Then why not appoint guardians at once to manage their affairs? It is futile to guard them against one class of contracts only. You close up one avenue to ruin, and leave open all others. This argument therefore fails, and this is the only one of any plausibility; whereas the objections to usury laws are numerous. They cannot be made effectual; for men who want money, and cannot obtain it at the legal rate, will give more; and the rate will be increased proportionally to the hazard. A tempting bribe is held out to knavery. The law offers a premium for violating the contract. The business of lending against law naturally passes into the hands of Shylocks; and they must charge enough to insure against the risk of refusal to pay on the ground of usury. The rate of interest is thus actually increased by the very means intended to limit it; but I will not pursue the argument. In this state, in the year 1824, a law was passed, entitled "an act fixing the rate of interest," in these words:—"That all creditors shall be entitled to receive interest on all money, after the same shall become due, either on bond, bill, promissory note, or other instrument of writing, or contract for money or property; on all balances due on settlement between parties thereto; on money withheld by unreasonable and vexatious delay of payment; and on all judgments obtained, from the date thereof; and on all decrees obtained in any court of chancery, for the payment of money, from the day specified in such decree for the payment thereof; or if no day be specified, then from the day of entering thereof, until such debt, money, or property is paid; at the rate of six per centum per annum, and no more." Taking this act by itself, though nothing is said of usury or forfeiture, yet the concluding words, "six per centum per annum, and no more," would seem at least to render a contract void for any *excess* above that rate, if they do not create an entire forfeiture; but taking it in connection with the act of 1804, which

it repeals, and which was expressly designed to prevent usury by providing for an entire forfeiture, it has sometimes been thought that the intention of the act was merely to fix the rate of interest where the parties had not fixed it; and that they are left free to stipulate for any other rate. Our court, however, after much vacillation, and some apparently contradictory decisions, have finally concluded that no more than six per cent. interest can be secured by express stipulation. For any excess above this rate, the contract is void. But illegal interest once paid cannot be recovered back; and a court of equity will not enjoin a judgment at law, on the ground of illegal interest, unless there has been a tender of what is lawfully due. Nor can the interest law be evaded by a stipulation for a certain per centage by way of collection fee; for all such stipulations are held to be void. And where a corporation is limited by its charter to a certain rate of interest, any contract for more is wholly void, not as against the interest law, but as an excess of power.

Lawful interest. In this connection, as interest is an incident to almost all contracts, I will state some of the leading rules by which it is governed. We have seen that the statute provides for interest in four classes of cases, viz. 1. (a) On contracts for money or other property after the same shall be due. This includes all contracts payable on a day certain, which is called the day of *maturity*; but where the contract is to pay on demand, interest is not chargeable until demand; though the contrary has been held where the contract was expressed to be for money lent. By our statute, interest is recoverable on bank notes from the time of demand and refusal; but the bank may give six weeks' public notice of intention to redeem, and then interest will cease after so commencing to redeem. Lastly, where the contract is to pay at a future day *with interest*, it is recoverable from date. 2 On balances due upon settlement of *accounts* between the parties. This only includes interest on the balance found due, from the date of the settlement, and not on the separate items from their date; and yet there is no doubt that each party may charge interest on the separate items, whenever from the custom of business, or the course of dealing between the parties, it can be inferred that such was their intention. 3. (b) On money withheld by unreasonable and vexatious delay of payment. This class is very indefinite. Perhaps it includes all cases of indebtedness after demand of payment. It undoubtedly includes money obtained by fraud, whether the party has used it or not. The theory of interest, when there is no express contract to pay it, is

(a) *Blaney v. Hendricks*, 2 Black. Rep. 761; *Kennerly v. Nash*, 1 Stark. Rep. 452; *M'Clure v. Longworth*, Wright, 582.

(b) *Mason v. Waite*, 17 Mass. 560; *Wood v. Robbins*, 11 Mass. 504; *Walker v. Bradley*, 3 Pick. 261; *Hogg v. Zanesville*, 5 Ohio, 410.

that it takes the shape of *damages for detention*. This implies something wrongful in withholding the principal; accordingly if a tender be made even after suit brought, it stops the running of interest after that time. So if an administrator pay a debt in full, and the estate afterwards turn out insolvent, he can only recover interest on the excess so paid, from the time the insolvency is decreed. 4. On judgments and decrees from the date thereof, that is, the first day of the term. On this class no comment is necessary. But the authorities establish another class of cases, viz. 5. (a) When it can be proved that the money has been used, and interest actually made. On this ground executors, administrators, guardians, trustees, receivers, and the like, are chargeable with interest on money in their hands; but interest is not chargeable, in favor of the other heirs, upon money given to a child by way of *advancement*. These five classes of cases probably include all those in which interest can be recovered, without any express contract for that purpose. But there are some other points which require to be noticed. 6. (b) Where by special agreement interest is due before the principal, a separate action can be brought to recover it; and in Ohio, if no suit be brought and it remain due and unpaid, interest upon interest, or compound interest, will be allowed. But the law varies in other places; and the weight of authority, though not of reason, is against it. 7. (c) Where partial payments have been made on a debt, the common rule is to compute interest down to the first payment, then deduct that payment, and so on for each of the successive payments. But in Massachusetts, the rule is thus modified; compute the interest down to the time when a payment or payments have been made exceeding the interest then due; add the interest and subtract the payment or payments; and thus proceed to the time of computation. This modification is made to avoid compound interest, by preventing the interest in any case from forming part of the principal. 8. (d) Where the contract is made in one place and payable in another, the rate of interest is governed by the law of the latter place; otherwise, by the law of the place of making the contract.

§ 178. *Express contracts*. The remarks hitherto made apply generally to all contracts; but it now becomes necessary to distinguish between the various kinds of contracts. The distinction between executed and executory contracts has been already explained. The next general division is into *express* and *implied*.

(a) Wyman v. Hubbard, 13 Mass. 232; Fay v. Howe, 1 Pick. 527; Osgood v. Breed, 17 Mass. 356.

(b) Cooley v. Rose, 3 Mass. 221; Fobes v. Cantfield, 3 Ohio, 17; Watkinson v. Root, 4 Ohio, 373; Hastings v. Wiswalt, 8 Mass. 373.

(c) Miami Exp. Co. v. Bank U. S. 5 Ohio, 261; Dean v. Williams, 17 Mass. 417; Hammer v. Neville, Wright, 169.

(d) Story's Conflict of Laws, 241, 253.

Express contracts are those, the terms of which are actually stipulated in uttered language: if the words are reduced to writing, they are termed *written contracts*; if not, *oral* or *verbal* contracts. Implied contracts are those which the law infers from the acts of the parties. *Parol* or *simple* contracts signify all contracts which are not under seal, whether express or implied.

What contracts must be in writing. The general rule is, that verbal contracts are as valid as written; but there are certain classes of contracts, which, for special reasons, the law requires should be in writing. These are provided for in the third, fourth, and fifth sections of the statute of frauds, which have been already described. This statute, it will be remembered, was designed to prevent *perjury* as well as fraud; and it will be readily seen, that to require a contract to be reduced to writing, is the best possible safeguard against perjury and consequent fraud, in relation to such contract. But I need not repeat a description of the contracts which must be in writing, by the three last sections of this statute.

Contracts under seal. (a) There is another division of contracts into *specialties* and *parol* or *simple contracts*. Specialties include *contracts under seal* and *obligations of record*. Simple contracts, otherwise denominated *parol contracts*, include all other contracts whether verbal or written. It is then the *seal* or the *record*, which constitutes the specialty. Seals are of two kinds, *public* and *private*. Public or official seals are those used by public officers, for the authentication of public documents. With these we have at present no concern. Private seals are those used by private individuals, in the execution of private contracts. A sealed contract is technically called a *specialty*, *deed*, *bond*, *covenant*, or *writing obligatory*. Every contract may be under seal, if the parties so elect; and there are some contracts which are invalid without a seal; as deeds for the conveyance of real estate, and various kinds of bonds prescribed by statute. The law relating to these contracts, abounds with technical and arbitrary distinctions, which serve no other purpose than to confuse the mind. There is perhaps no branch of law in which reform would be more salutary. It may be safely asserted that the total abolition of private seals would be an immense improvement, without any admixture of evil; for they are not only of no conceivable use, but positively injurious, from the complexity which they occasion. This will be evident from a brief examination. According to Blackstone, seals were first introduced, because men could not write. (b) Not being able to ratify contracts by

(a) 2 Black. 305; 4 Kent, 452; Platt on Covenants; Hurlstone on Bonds.

(b) 2 Black. 295; 4 Kent, 452; Jackson v. Wood, 12 Johns. 73; Jackson v. Stevens, 13 Johns. 316; Bond's Lessee v. Swearingen, 1 Ohio, 402; Ayres v. Harness, 1 Ohio, 368; Violett v. Patton, 5 Cranch, 142; Hall v. Phelps, 2 Johns. 451; Fox v. Reil, 3 Johns. 477; 1 West. Law Jour. 385; Farmer's Bank v. Haight, 3 Hill, 493.

signature, each person had his own particular *seal*, with some distinctive *device*, which he used in the place of a signature. The moment therefore that writing became general, the reason of using seals ceased; but the custom nevertheless continued. From the origin of seals then we gather this; that instead of being a "relic of ancient wisdom," as the books declare, they are in reality a monument of ancient ignorance. We further learn that the original purpose of a seal has been entirely lost sight of, in modern times; for we not only never affix a seal without a signature, but where a person cannot write his own name, we write it for him, and he ratifies it. In fact seals are so far from being used to identify contracts, that they very seldom have any distinctive character to indicate to whom they belong. They are generally affixed by the scrivener, as a part of his business. For what purpose then are seals continued in use? The pretext is that they add *solemnity* to the instrument to which they are affixed. To judge from the language of the books, one might suppose that a seal was some mystic symbol or amulet; and that the ceremony of affixing it was attended with something like religious pomp. But according to Lord Coke, "a seal is wax impressed, because wax without an impression is not a seal." The solemnity, then, which is attached to a seal, must consist in melting the wax, and making the impression; a rite which certainly cannot be very august or awful. But how is even this solemnity diminished, when we come to the definition of a seal in our statute; which may be "either of wax, of wafer, or of ink, commonly called a scrawl seal." Chancellor Kent considers this substitution of a "flourish with a pen at the end of the name," in place of the ancient seal, as a virtual abolition of seals. It does indeed show how utterly insignificant seals are; but it does not take away one of their legal consequences. The "scrawl" which we have substituted, possesses the same mysterious virtue as the wax described by Coke; yet it is upon this theoretical solemnity of a seal, that the principal distinctions between sealed and unsealed writings are founded. Some of these distinctions I will now enumerate. 1. The presence of the seal is said to *estop* the party, that is, to preclude him from proving anything to the contrary: when by the same words without a seal, he would not be *estopped*. Now common sense would indicate that if the doctrine of *estoppel* be ever proper, it should be founded upon the nature of the averment, and not upon the mere presence of a seal. 2. The presence of a seal is said to *import a consideration*, without its being expressly stated, and to preclude the denial of that fact; when the same words without a seal, would have no such effect; and such is the doctrine of the common law; but it is so unreasonable, that a statute has lately been passed in this state, allowing the consideration of all contracts, whether sealed or not, to be called in question; with the exception of negotiable

contracts, after being negotiated. 3. At common law, a debt due upon a sealed contract was entitled to a priority of payment out of the assets of a deceased person, before any debt due upon a contract not under seal; but this doctrine is also deemed so unreasonable, that our statute of distribution allows no such preference. 4. A contract cannot be filled up over a seal and signature in blank, though left for that express purpose; whereas, the same words may be written over a mere signature in blank, and the contract will be valid. This distinction, though palpably unreasonable, has been recognized by our own court. 5. If there be a subscribing witness to a sealed instrument, the confession of the party who executed it, will not be admitted to prove the execution, if the witness can be had; whereas, if there be no seal, the confession will be sufficient. This distinction, is so utterly absurd, that it is matter of astonishment it should ever have been adopted; it has, however, been recognized by the courts of this country. 6. No agent can affix the seal of his principal, unless his authority so to do be under seal; whereas, a mere verbal authority will be sufficient for affixing the signature of the principal. And the same doctrine applies to the revocation of an agent's authority by the principal. 7. A surety upon a contract under seal, is not released by giving time to the principal, unless the agreement for extension be under seal; whereas, a mere verbal agreement for extension will release a surety upon a contract not under seal. 8. A contract under seal being of a higher nature, supersedes a simple contract upon the same subject-matter. The latter is said to be *merged* in the former. 9. The remedy upon contracts under seal, is from beginning to end, entirely different from that upon contracts not under seal. This will be demonstrated when we come to speak of the modes of proceeding. Such are a few of the distinctions, founded upon the presence or absence of a seal, which render the law of contracts, otherwise so simple and reasonable, in this one respect a collection of arbitrary principles. What an immense superstructure to be built on so slight a foundation! Yet such is the common law; and such it must remain, until legislation shall do away with private seals. It is not denied that some contracts should be executed with more formality, and proved with more care, than others. On this principle we have seen that the statute of frauds properly requires certain contracts to be in writing; that the statute of *wills* as properly requires them to be *attested*; and that the statute of *deeds* requires them to be both *attested* and *acknowledged*. But the reason of these requisitions has not the most remote application to the use of seals; for it cannot be pretended that seals add any thing to that vigilance and precaution in executing and proving contracts, which these provisions are intended to secure.

Deeds. The foregoing remarks apply generally to all sealed instruments. I shall now refer to the particular classes, beginning

with *deeds*. The term *deed*, as we have already seen, is applicable to all contracts under seal, by way of eminence, because, in the language of Blackstone, it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; but it is now most frequently used in a restricted sense, to denote an instrument for the conveyance or incumbrance of real estate. Its form and requisites for this purpose, have been fully considered. Deeds are divided into two kinds, *deeds poll*, and *indentures*. A *deed poll*, or *single deed*, is a deed executed by only one party; and was so called, because, when forms were more regarded than substance, the edge of such deed was not *indented*, but *polled* or shaved quite even. Whereas, an *indenture*, which is a deed executed by more parties than one, was so called, because as many *copies* or *counterparts* were required to be executed, as there were parties; and the edges of each were so notched or indented as to correspond one with another. This useless formality is now obsolete, but the name remains; and whenever parties enter into mutual covenants or engagements under seal, the instrument is an indenture. The most frequent instances are *indentures of lease*, and *indentures of apprenticeship*, which have been already described.

Bonds. (a) The term bond, is used to denote the *acknowledgment* of an existing debt under seal. It differs from a *covenant* in this, that the latter is always an executory contract for something future; though each is technically called, by way of eminence, a *writing obligatory*. Bonds are of two kinds, *single bonds* and *penal bonds*. A *single bond*, more frequently called a *single bill*, is a simple acknowledgment of indebtedness without any condition or qualification; as if I, under hand and seal, acknowledge myself indebted to you in a given sum. A *penal bond* is an acknowledgment of indebtedness, accompanied by a *condition*, upon compliance with which, such acknowledgment is to be void. The sum here named as a debt is called a *penalty*, because it is inserted merely to secure the performance of the condition, which is the principal thing; as if I, under hand and seal, acknowledge myself indebted to you in a given sum, upon condition that it is to be void, upon my doing a certain thing, as to pay money or to convey land. And it has been decided that an action will not lie to recover a penalty, unless it be under seal. Besides the penal bonds given by individuals in their private transactions, our statutes require that all bonds given in the course of judicial proceedings, and all official bonds given for the performance of duty, shall be in this form. Penal bonds, therefore, occupy a wide space in the law. But, the very idea of a penalty

(a) Huddle v. Worthington, 1 Ohio, 423; Nelson v. Ford, 5 Ohio, 473.

supposes that the amount is greater than the value of the condition, the performance of which it is designed to secure; yet as the law formerly stood, if the condition was not strictly performed, the entire penalty could be recovered. The hardship, thus frequently occasioned, induced chancery to interfere and prohibit the recovery of any thing more than reasonable damages, for the nonperformance of the condition. But now the application to chancery is unnecessary, because our statute enables the courts of law to do the same thing. As a matter of form, the judgment is given for the entire penalty; but the actual damages are assessed by a jury, and execution issues for no more than the amount of their verdict. The result, therefore, is, that a penal bond now amounts to no more than a covenant to perform the condition, and may be treated as such.

Specialties of record. These include obligations of indebtedness evidenced by judicial records. Such records form the highest possible kind of evidence; insomuch that the only question which can be controverted, is, whether the record exists. If it does, it imports absolute verity. So that specialties of record are the highest kind of specialties. And as a simple contract is merged in a sealed contract upon the same subject-matter, so a sealed contract is merged in a specialty of record. These specialties are of two kinds; *recognizances*, and *judgments* or *decrees*. A recognizance is an acknowledgment of indebtedness made before the court or some authorized officer thereof, with a condition to be void on doing certain things therein named; which acknowledgment is made part of the record of the cause to which it relates. The object of a recognizance is to secure the appearance of a defendant or witness. The statutes provide when it may be taken, and what shall be its form. As to *judgments* and *decrees*, they are barely mentioned under this head, because they are the highest kind of specialties; but as they have little or nothing in common with contracts, a discussion of them is reserved for another occasion.

§ 179. *Implied contracts.* There is, perhaps, no branch of law, which the mind of an unprejudiced person will contemplate with more satisfaction, than that which regulates implied contracts. The broad principle which governs them, may be thus stated. Every member of society has impliedly contracted to do whatever the law requires of him: if, therefore, without any special contract, he acts in such a manner as to create a legal liability, he is as much bound to fulfil that liability, as if he had expressly contracted so to do. On this theory, every kind of indebtedness, which is not by express contract, may be referred to an implied contract. The most common instances of implied contracts are these. If you, with my consent, or at my request, have done work of any kind for me, without any express agree-

ment as to compensation, I have impliedly contracted to pay you a *quantum meruit*, what it is reasonably worth. If you have sold me goods of any description, and I have consented to receive them, without any agreement as to price, I have impliedly contracted to pay you a *quantum valebant*, what they are reasonably worth. If you and I have settled accounts, and agreed upon a balance due from me to you, I have impliedly contracted to pay that balance. If you have lent me money, I have impliedly contracted to pay you. If, at my request or with my consent, you have paid money to another for my use, I have impliedly contracted to repay you. If you have received money from me or any other person, which on the principles of justice ought to be paid to me, you have impliedly contracted to pay it to me. If you have undertaken the custody of property belonging to me, you have impliedly contracted to use due diligence in keeping it safely. If I have permitted you to use property belonging to me, you have impliedly contracted that you will not abuse it. And if I have employed you to do some service requiring a certain amount of skill, you have impliedly contracted to apply such skill. These examples sufficiently explain the nature of implied contracts; and when we come to the law of procedure, we shall find that the common counts in debt and assumpsit have been framed with a special view to furnish a remedy upon such contracts. In fact, there are many cases where, though an express contract was made, it may be waived, and a remedy sought upon the implied contract. Thus where an express contract for service has been fully performed on one side, or where it has been put an end to by the act of the parties, compensation for the service rendered may be sought on the implied contract for a *quantum meruit*. But for technical reasons, where the express contract is a specialty, the remedy must be sought upon the specialty itself, with the single exception of an action of debt for rent. (a)

LECTURE XXXIII.

PARTICULAR CONTRACTS.

§ 180. *Negotiable contracts.* (b) In the preceding lecture I have considered the nature and general divisions of contracts; but there are certain classes of contracts, which, on account of

(a) 1 Chit. Plead. 339, 346, 348; 2 Binney, 4; 7 Cranch, 299; 1 Ohio, 355.

(b) See 3 Kent, lec. 44; 2 Black. 466; Story on Bills; Bayley on Bills; Chitty on Bills; Kyd on Bills; Cunningham on Exchange.

their peculiar practical importance, seem to require a distinct consideration. These are, *negotiable contracts*; *the contract of sale*; *the contract of bailment*; *the contract of principal and surety*; *the contract of insurance*; and *liens*. I propose in this lecture to describe, of course very briefly, each of these contracts, beginning with *negotiable contracts*. It was an ancient doctrine of the common law, *that contracts could not be assigned*. The reason of this doctrine is said to be, that the right of a party to a contract, is a right to sue, in case of non-performance; and to permit a party to assign or transfer this right to another, would encourage litigation. This reason is not true in point of fact; since the assignee of a contract could have no motive to sue, which would not equally operate upon the original party. Still it was an ancient rule that *choses in action* could not be assigned. But like most rules not founded in reason, this rule has now become merely technical in law, and does not exist in equity. It prohibits me from so transferring to you my interest in a contract, as to enable you to sue at law in your own name; but I can so transfer my interest as to enable you to use my name in a suit for your benefit; and the law will protect such a transfer; so that for all substantial purposes, contracts in general are now as much assignable, as any other property; and even to this technical prohibition, there is a class of contracts denominated *negotiable*, which have always formed an exception; it being the very essence of these contracts, that they can be transferred absolutely from hand to hand, so as to authorize the holder to sue at law in his own name.

Requisites of negotiability. Negotiable contracts were introduced in modern times for the benefit of commercial intercourse. They are designed to circulate readily from hand to hand, and thus multiply the facilities of traffic and credit; and in order to answer this purpose, they must evidently carry upon their face, all the means of determining their worth. Accordingly the following properties are requisite to render a contract negotiable; *first*, it must be in writing; *secondly*, it must be for the payment of money only, and not for other property; *thirdly*, it must be for the payment of a sum certain, and not for unliquidated damages; *fourthly*, the sum promised must be payable absolutely, and without conditions; *fifthly*, the contract must contain words of negotiability, as "*to order*," "*to assigns*," or "*to bearer*;" and *sixthly*, it must import a *consideration*, so as to preclude the necessity of inquiry and proof. (a) A contract possessing

(a) This relates to holders who are not the original parties; for between the original parties the question of consideration is open. So a gaming consideration, by our statute, may be inquired into between any parties. And where negotiable paper has been fraudulently transferred, the holder, though he knew not of the fraud, cannot recover, unless he took the paper in the regular course of business and for an actual consideration. Whether the payment of an antecedent debt is such a consideration,

these properties is fitted for negotiation, since it is liable to no other question, than what relates to the responsibility of the parties.

Mode of transfer. The transfer is effected in two ways; *first*, where the contract is payable "to order," or "to assigns," it is negotiable by *indorsement*, that is, by writing upon the back; and *secondly*, where it is payable "to bearer," it is negotiable by mere *delivery*, without writing. (a) Indorsements are of two kinds; *first*, a *blank indorsement*, where the holder simply writes his name, without any other words, which is equivalent to an order to pay to bearer; for it thenceforth passes by mere delivery; and any subsequent holder may fill up the indorsement, so as to make the contract payable to himself; and *secondly*, a *special indorsement*, which specifies the person to whom the contract is transferred. If it be indorsed to him or his order, he can only transfer it by another indorsement. But the indorsement does not require negotiable words. The first indorser may stop the negotiability by expressing that intention; as by indorsing to one person *only*, to one person and *no other*, and the like; but in the absence of such restrictive words, the negotiability remains: and it is said that none but the first indorser can, even by express words, restrict the negotiability.

What contracts are negotiable. At common law, *bills of exchange* were the only negotiable contracts; by the statute of Anne, *promissory notes* were placed upon the same footing; and by our statute, *bills*, *notes*, and *bonds* are made equally negotiable: but this statute does not vary the requisites of negotiability before enumerated; indeed it is sufficient, so far as negotiability is concerned, to consider all negotiable instruments as divided into two classes, *orders* and *promises*: for a bill of exchange is a *written order* for the payment of money; which definition equally embraces *checks*, *drafts*, and *orders* commonly so called: and a promissory note is a *written promise* for the payment of money, which definition equally embraces promises under seal, whether denominated *bonds* or *single bills*. The parties are thus designated. In a bill, the person who makes the order is called the *drawer*; the person in whose favor it is made, the *payee*; and the person to whom the order is addressed, the *drawee*, and after acceptance, the *acceptor*. In a note, the person who makes the promise is called the *maker*; and the person to whom it is made, the *payee*. When the payee either of a

query.—Riley v. Johnson, 8 Ohio, 526; Coddington v. Bay, 20 Johns. 637; Bristol v. Sprague, 8 Wend. 423; Wordell v. Howell, 9 Wend. 170; Rosa v. Brotherson, 10 Wend. 85; Hart v. Palmer, 12 Wend. 523. *Contra*, Swift v. Tyson, 16 Peters, 1; Brush v. Scribner, 11 Conn. 388; Bank of Salina v. Babcock, 21 Wend. 490; Bank of Sandusky v. Scoville, 24 Wend. 115.

(a) But under the Ohio statute, *query* if any instrument can be negotiated without indorsement. See Avery v. Latimer, 1 Western Law Journal, 310.

bill or note, has indorsed it to a third person, it is then said to be *negotiated*. He becomes the indorser, and the person to whom it is transferred, the *indorsee*. He may in his turn become the indorser; and so on indefinitely. The person having a right to the bill or note at any particular time, is called the *holder*.

Common form of notes and bills. No set form of words is necessary, either for a note or bill. It is usual and expedient to begin with naming the *place* and *date*, but not indispensable; since these may be proved by parol. The bill then proceeds substantially in a form like this:—"Three months after date pay to the order of C. one thousand dollars for value received." This is signed by B. the drawer, and addressed to A. the drawee; who accepts, by writing the word "*accepted*" on the face, and signing his name. A note usually proceeds thus:—"Three months after date, I promise to pay to the order of B. one thousand dollars, for value received." This is signed by A. the maker; and thus far we perceive little resemblance between the two: but when B. the payee of the note, has indorsed it to a third person, thus: "*Pay to the order of C.*" the resemblance is complete; for the note is then converted into a bill. B. the indorser of the note corresponds to B. the drawer of the bill; A. the maker of the note, to A. the acceptor of the bill; and C. the holder of the note, to C. the holder of the bill. Their liabilities too are identical. In both cases, A. is the party first liable to the holder, and B. undertakes to pay if A. does not, upon due notice of the *dishonor*. The words "*for value received*," are above inserted, because they are customary; but they are never indispensable. If present, they do not prevent the denial of a consideration, as between the original parties; and if wanting the consideration cannot be denied after negotiation, except it be for gaming. The *time of payment*, which is called the *maturity*, is, in the above examples, a given time *after date*. It may, however, be *on demand*, or a given time *after sight*. In the former case, the demand may be made at any time; and this determines the maturity: in the latter, which applies to bills only, *sight* means *presentation for acceptance*. In this case, the acceptor dates his acceptance, and this determines the maturity. As bills are usually drawn upon some distant place to which they are transmitted for acceptance, to guard against accident or miscarriage, it is common to draw two or three on the same account, which constitute a *set*. In this case the first is specified to be payable, "*the second and third of the same tenor and date being unpaid*;" and in like manner the rest; so that the payment of the one which first arrives, makes the rest void. It is not necessary to specify the particular *place of payment*; but when this is done it becomes a part of the description of the bill or note: and although no demand need be made there, in order to charge the acceptor or maker, yet if he had the money there he is not in default, and there must be a

subsequent demand before an action can be sustained. A bill or note may be filled up over a signature *in blank* left for that purpose; and if a blank be left for the payee's name, any rightful holder may insert his own name; but a bill or note payable to one or two persons, or order, would be void for uncertainty. It is sufficient, however, to make it payable *to bearer*, without specifying any name: and if the payee be a fictitious person, and his name purport to be indorsed, it may be treated as payable to bearer. A subscribing witness is never indispensable, unless by special provision, and sometimes creates inconvenience; because, in proving the execution, such witness must be produced, or his absence accounted for. Where several persons unite in a note, it may be *joint* only, or *joint and several*. If they simply say, "*we promise*," or "*we jointly promise*," it is a joint liability only, and all must be sued: but if they say, "*we or either of us promise*," or "*we jointly and severally promise*," the liability is both joint and several, and either or all may be sued. It has also been held that when a note says, "*I promise*," but is signed by two or more, they are severally liable.

Acceptance. This is to be considered with reference to bills only: for notes, as, we have seen, are accepted in the act of making, and before the indorsement which converts them into bills. The holder of a bill is required to present it to the drawee for acceptance. If payable at a given time after date, it need not be presented until maturity: if payable at sight, or a given time after, it must be presented within a *reasonable time*; for the drawer does not undertake to be liable for ever; and what is a reasonable time will depend upon circumstances; among which the distance, the custom of trade, and the fact of being kept in circulation, are the most important. If the drawee have a place of business, the presentment must be made there; if not, at his residence; and if that cannot be found, diligent inquiry must be made. If the drawee be dead, the presentment is made to his representatives. The acceptance may be verbal, but is usually in writing. A promise to accept will be equivalent to an acceptance, if it has given credit to the bill; and an acceptance has been implied from the conduct of the drawee. The holder is not bound to take a qualified acceptance; as for part only; or for a different time; or on some contingency; and if he consent so to do, he discharges the drawer.

Protest and notice. If the bill be not accepted, the next step is to have it protested for *non-acceptance*; at least this is the law in England and in most of the states. In some states, however, it has been held not to be necessary to protest for *non-acceptance*, but only for *non-payment*. In this state, nothing has been decided; but our statute regulating damages on protested bills, recognizes a protest for non-acceptance, and it would not be safe to

dispense with it. The protest is made by a *notary public*, (a) an officer recognized in all commercial nations. In this state he is appointed by the governor for three years, and is under official bond and oath. His notarial acts are verified by his *official seal*. The statute declares that due faith and credit shall be given to his protestations, attestations, and other instruments of publication. At present, however, we are concerned only with his agency in protesting bills. His protest is an official declaration under seal, of the fact of presentation and refusal; and is every where received as *prima facie* evidence thereof, to save the trouble of taking other testimony. The next step is to *notify* the drawer and indorsers, in order to fix their liability; since they impliedly engage to pay only in case of failure by the drawee, and due notice thereof. The notice must be given in a reasonable time, which is a mixed question of law and fact. The rule is, that notice must be sent by the first regular conveyance, by mail or otherwise. If it be put in the post-office properly directed, this is sufficient. The same remarks apply to the presentation for payment, protest for non-payment, and notice thereof; and need not therefore be repeated. But a protest is only required in case of bills drawn upon a place out of the state. Notes, and domestic bills, need not be protested in order to charge the indorser. Notice of non-payment is all the law requires. (b)

Rights and liabilities of the parties. The holder of a note or bill is presumptively the owner thereof, until the contrary be shown, unless there be something on the paper itself to raise a doubt. The acceptor of a bill, or the maker of a note, is the party primarily liable for its payment. He is liable to every other party on the paper, as well as to the holder; and with respect to the drawer and indorsers, the rule is that each is liable to all that come after him on the paper, unless the indorsement be *without recourse*; and, on the other hand, has a claim upon all who come before him on the paper. In other words, each successive indorser contracts with all who come after him, that he will pay, if the maker or acceptor do not, the proper steps having been taken to charge them. The holder, therefore, on non-payment by the maker or acceptor, and notice, may elect to proceed against any one of the other parties; or may begin with the last, and proceed against each successively up to the first; or may proceed against each of them contemporaneously; and the party who pays him, may do the same with respect to every party prior to himself; and so on up to the first party. We have a statute requiring holders of a note or bill, to join the drawer and indorsers in

(a) See Brooke's Treatise on the Office and Practice of a Notary.

(b) A bank check, though payable at a future day, is not such a bill as requires either protest or notice, to charge the drawer. 6 Law Reporter, 508. Nor is a certificate of deposit, though negotiated by indorsement, binding on the indorser, though notified of its dishonor. 1 West. Law Jour. 287.

the same suit, under the penalty of not recovering costs in separate suits. We also have a statute affirming the doctrine of commercial law, that where paper is negotiated after maturity, the maker, drawer, or obligor may set up any defence against the holder, which he might have done against the original payee; because such holder ought to suspect such paper; and even when negotiated before maturity, if the holder has actual notice that a portion has been previously paid, though not minuted on the paper, he can only recover the residue. The common rule is, that *accommodation paper* is placed on the same footing, as business paper. But our court has decided, from the peculiar wording of our statute, (a) that where persons indorse for the accommodation of another, they are to be considered, with respect to each other, as *co-sureties*; and each must make good his contributive share, to the one who is compelled to take up such paper. But the decision would not embrace an accommodation acceptor. By our statute, where the consideration even of negotiable paper is a gambling consideration, the paper is utterly void even in the hands of an innocent holder, without knowledge of the fact. This seems unreasonable and unnecessary. The paper ought to be void only with respect to those who have knowledge of the fact. *Damages* can only be recovered on protested bills, not on notes. The amount varies according to the statutes of the different states. Here, the amount is twelve per centum, if the bill be drawn upon a person without the United States, and six per centum, if drawn upon a person without the state, but within the United States. This amount is exclusive of interest and charges of protest; and may be recovered either upon protest for non-acceptance or non-payment, against any party but the acceptor. These damages are designed to indemnify the holder for the disappointment and expense of making good the bill in the distant place on which it is drawn; and to save the drawer and indorsers from this increased liability, it is a principle peculiar to this branch of law, that any person may, after protest for non-acceptance or non-payment, volunteer to accept or pay *supra protest*, as it is called; for the honor of any or all the parties to the bill; and by so doing, and giving due notice thereof, he becomes entitled to all the rights of a regular holder of the bill, as to those parties for whose honor he intervenes. This is almost the only instance where one can become the creditor of another, without his knowledge or consent. But it is not the only instance in which the law shows a particular favor to negotiable paper. We have a statute providing that the plaintiff, suing on a note, bill, or bond,

(a) *Douglass v. Waddle*, 1 Ohio, 413. *Contra*, *Fentum v. Pocock*, 5 Taunt. 72; *McDonald v. Magruder*, 3 Peters, 470; *Murray v. Judah*, 6 Cowen, 484; *Montgomery v. Walker*, 9 Serg. & R. 229.

need not prove the signature of the defendant, unless he first denies it under oath. This provision often saves much trouble and expense to the holder, without any unfairness to the other party. We also have a provision on the subject of *days of grace*, adopting the usual custom of allowing three days after maturity before default, with respect to all negotiable paper. It is very common in this part of the country (*a*) to find contracts in the form of notes or orders, "payable in currency," or "payable in goods." Such contracts, however, are not negotiable, because not payable in money; but it has been decided that if not paid at maturity, in currency or goods, the full amount may be recovered in money. With respect to *bank notes*, our statute prohibits them from being made payable at a future day. Being on demand, they do not carry interest until demand is made. Then they carry interest until the bank redeems or offers to redeem them; and banks cannot refuse to receive their own notes, in payment of debts. In Massachusetts it is held that the giving of a promissory note or bill of exchange, in payment for goods, unless there be a stipulation to the contrary, is so far payment, as to extinguish the right of action against persons originally liable for the goods, but not parties to the note or bill. But the contrary is held in New York, and, it would seem, on better reasoning. (*b*) A similar question has arisen with respect to the bank notes of broken banks, and there is a like contrariety of decision. In New York it is held, that although neither party knew that the bank was broken, yet if in point of fact the bank was at the time insolvent, the loss falls upon the payer, and the receiver may recover of him the original consideration, as if nothing had been paid. But in Pennsylvania and elsewhere, the loss is held to fall on the receiver, when their is no fraud; and this would seem to conform to the common understanding of mankind, which is to treat bank notes as money. (*c*)

§ 181. *Contract of sale.* (*d*) When discussing the subject of *title by purchase*, my remarks were chiefly confined to realty. I then observed that personalty is generally transferred by mere delivery. In fact but two exceptions to this rule now occur to me. One is the transfer of contracts not payable to bearer, which, as we have just seen, must be *by indorsement*. The other is the transfer of vessels, which, as we have seen when speaking of the regulations of commerce, must be evidenced by a written *bill of sale*.

(*a*) Dugan v. Campbell, 1 Ohio, 115; Byington v. Geddings, 2 Ohio, 227; Rhodes v. Lindley, 3 Ohio, 51.

(*b*) Chapman v. Durmit, 10 Mass. 47; Schermerhorn v. Loines, 7 Johns. 311; Muldan v. Whitlock, 1 Cowen, 290; Wilkins v. Reed, 6 Greenleaf, 220.

(*c*) Lightbody v. Ontario Bank, 11 Wend, 1; same case in Error, 13 Wend. 101; Miller v. Race, 1 Bur. 452; Young v. Adams, 6 Mass. 182; Scruggs v. Gass, 8 Yerger, 175; Bayard v. Shunk, 4 Law Reporter, 214; Imbush v. Mechanics' Bank, 1 West. Law Jour. 49.

(*d*) 2 Black. 446; 2 Kent. lec. 39; Long on Sales; Pothier on the Contract of Sale, by Cushing.

On these exceptions I have nothing further to remark; and shall confine my observations to the incidents belonging to the general contract of sale.

What constitutes a sale. We have seen that by the English statute of frauds, no contract for the sale of goods exceeding ten pounds in value will be valid, unless the buyer actually receives some part of the goods; or pay some part of the price by way of earnest; or there be a written memorandum of the contract signed by the party to be charged. It is to be regretted that we have not such a provision in our statute; because now, to determine what constitutes a sale, we have to refer to the general elements of a contract before described. There must then be something more than mere *words*, or there will not be a consideration. For example, if you say you ask so much for an article, and I say I will give it, and nothing more pass between us, this is not a binding contract, because there is not yet a consideration. Something else must be *done* by one of the parties to bind the contract; the buyer must either pay or offer to pay some part of the price, or the seller must deliver or offer to deliver some part of the goods, or the contract will not be complete. But almost any thing demonstrating an understanding that the contract is completed, will be held sufficient. Thus, if the goods have been marked, or laid aside, or sent to any place by the direction of the buyer, he will be held responsible. We say then, in general terms, that the contract of sale is completed, when the buyer has acquired the right to demand the goods; or the seller, to demand the price of the goods; and that this happens whenever, in addition to the mere words of a bargain, either party has done any act, no matter how trifling, which can be construed into a consideration. In sales conducted *by letter*, the true rule would seem to be, that the sale is complete, when a letter containing the proposal has been received, and an answer containing the acceptance has been despatched, provided it be in a reasonable time. But where a specified time has been given for an answer, the proposal may be withdrawn at any time before acceptance. In sales *by number, weight, or measure*, the sale is not complete, until the specific property sold is separated and identified. In sales *at auction*, the auctioneer acts as the agent of both parties. The bidder may retract his bid before the hammer is down, but not after. Here then the bid on one side, and the acceptance on the other by knocking down the hammer, complete the sale.

The warranty. (a) When the article sold is in the possession

(a) In *Gallagher v. Waring*, 9 Wend. 28, it was held, that a warranty that an article is merchantable will be implied, though no sample was exhibited at the sale. In *Lain v. Fidgeon*, 6 Taunt. 108, the same doctrine was held. In *Jones v. Bright*, 5 Bing. 533, it was held that if a man sells generally, he warrants the goods fit for some purpose; if he sells for a particular purpose, he undertakes they shall be fit for that purpose. In *Bridge v. Wain*, 1 Stark. 504, it was held that goods sold as goods of a

of the seller, there is an implied warranty of *title*; but if not in possession of the seller, there is no implied warranty, and the maxim is, *caveat emptor*, let the buyer take the risk, for he is put upon inquiry. As to *quality*, there is no implied warranty in any case where there has been an opportunity for inspection. In sales by *sample*, the only implied warranty is, that the bulk shall correspond to the sample; and in sales by *description*, that the article shall be of the *kind* described, and not a different article. With regard to the *deception* which will render the seller liable, it may be either an intentional concealment of the truth, or an intentional statement of falsehood. It is difficult to lay down any precise rule upon this subject. The law does not expect minds to be equal, or knowledge to be equal; but it expects men to be

certain kind are warranted to be such. In this case the goods were scarlet cuttings; there was proof what scarlet cuttings were; the goods furnished were scarlet cloth, but of an inferior quality to that known by the above name: judgment was for the plaintiff, on the ground above mentioned. In *Gardiner v. Gray*, 4 Camp. 144, Lord Ellenborough says, "the purchaser has a right to expect a saleable article answering to the description in the contract. Without a particular warranty, this is an implied term in every such contract." In 13 Mass. 145, Chief Justice Parker cites a case where it was held that an advertisement in the newspaper amounts to a warranty. In *Jones v. Bowden*, 4 Taunt. 847, Justice Heath cites the following case decided by himself. Some sheep were sold for stock; it was in evidence that stock sheep meant sheep that were sound, and he held that there was an implied warranty that the sheep were sound. In *Shepard v. Kain*, 5 B. & Ald. 240, the following was the case: A ship was advertised as a copper fastened vessel, with these words, "to be taken with all faults, and without allowance for any defects whatsoever." The plaintiff had had opportunities to examine. The vessel was but partially copper fastened. Held that the meaning of the advertisement must be, with all the faults that a copper fastened vessel may have. Here the vessel was not copper fastened. There was a warranty that she was a copper fastened vessel. In *Seixas v. Wood*, 2 Caine's Rep. 48, it was held that to entitle the plaintiff to recover where one article was sold for another, there must be a warranty or fraud. If the defendant knew that the article was not what he sold it for, that would be fraud. In *Springwall v. Allen*, 2 East, 448, (in note) it was adjudged that the *scienter* was the gist of the action when there was no warranty. *Seixas v. Wood* has been overruled in 4 Cowen, 444, and 12 Wend. 566. In *Chandelor v. Loper*, 4 Cro. Jac., a jewel was sold as a bezoar stone, which was not such; and it was held, if the defendant did not know that it was not a bezoar stone, no action lies. This case is denied in 13 Mass. 143; and see *Greenleaf's Cases Overruled*, 75. In *Sweet v. Colgate*, 20 Johns. 196, plaintiff sold defendant an article by both supposed to be barilla; it proved to be a different article. Held, that as there was no warranty or fraud, the plaintiff must recover. The plaintiff in this case was but an agent selling the goods on commission. It was also decided that an advertisement or invoice entry did not amount to a warranty. But, say the court, if a vendor agrees to sell Madeira wine and sends Tenerife, the vendee would not be bound to pay for it. In this case the sale was by sample; the bulk of the article corresponded with the sample, and that absolved the plaintiff from further responsibility. In *Hart v. Wright*, 17 Wend. 267, the doctrine which raises, on a fair sale of an article of goods or merchandise, the implied warranty that it is merchantable or fit for the purpose intended, is repudiated; but a contract to deliver goods generally of a certain description is another matter. There the vendee may insist that they shall be merchantable, and if they prove not to be so, they may be returned. In *Salisbury v. Stainer*, 19 Wend. 159, hemp was sold in bales. Salisbury was told to examine them, and did examine some; but this was held to be no sale by sample, and no warranty that the bulk should correspond with the part examined. Where the purchaser has had such an opportunity to examine, the seller is not liable in the absence of fraud.

honest; and this requires, first, that nothing shall be misrepresented; and, secondly, that any peculiar or extraordinary information, which one of the parties has, and knows that the other has not, should be made known. As to the ordinary skill or information belonging to the subject-matter, the law expects each man to possess it, and will not relieve him against the want of it, unless it amount to a case of idiocy, lunacy, or drunkenness.

Markets overt as they exist in England, are not known in this country; (a) and we have adopted the broad, though sometimes unjust principle, that no person can transfer a greater right or better title to any chattle, than he himself possesses. If, therefore, a thief, or even the bailee of a chattle, sell it to a person who does not know that he is not the owner, and it pass through ever so many hands of innocent purchasers, without notice, still the original owner may reclaim it, wheresoever he can find it.

Other matters. (b) When the bargain has been struck, and the sale is complete, the goods are entirely at the risk of the buyer. And the sale is complete, when the seller has done all he has to do with respect to the goods. A delivery to the carrier, or to the agent of the buyer, is a delivery to the buyer himself. As to the time of delivery and payment, the rule is, that when no time is agreed upon, they are concurrent acts to be performed forthwith. Either may tender performance, and then demand performance of the other; and on the other hand, either may refuse to perform, unless the other will. But if goods have been actually delivered and received in good faith, before payment, the buyer has acquired a title to the goods, and the seller can only recover the price agreed upon; or if no price was agreed upon, then a reasonable price. To this rule, however, the right of *stoppage in transitu*, forms a partial exception. This is an equitable right, which the law gives to the vendor, when the vendee becomes insolvent, and the goods were sold on credit, to resume possession of the goods any where on their *transit* to the vendee, and before they come into his actual possession. There is much nice learning connected with this right, for which I have not room. The right is confined strictly to vendor and vendee, and the chief question is, when the transit begins and terminates? This being settled, the rule is clear, that while the goods are *in transit*, the vendor may stop them for his own security, as against the insolvent vendee. But if the vendee is actually in possession of the goods; or if before reaching him, he has honestly sold them to a third person, the vendor cannot seize them. He must then take his chance with the rest of the creditors. When a sale has been perfected, and the buyer refuses to accept the article, the vendor may sell it at auction, and

(a) *Roland v. Gundy*, 5 Ohio, 202.

(b) *Macomber v. Parker*, 13 Pick. 183; *Tarling v. Baxter*, 6 B. & C. 360; *Farnum v. Perry*, 4 Law Reporter, 276.

recover the difference. When no place of delivery is specified in the contract, the law implies that it is the place where the article is at the time of sale.

§ 182. *Contract of bailment.* (a) The most approved definition of this contract is, a delivery of goods in trust, upon a contract express or implied, that the trust shall be duly executed, and the goods restored to the owner, as soon as the purpose of the delivery shall be answered. The person making the delivery is called *bailor*, and the person receiving it *bailee*. The transaction itself, and sometimes the thing bailed, is called *bailment*. The term is derived from a French word, signifying, *to deliver*. It will be obvious from the above definition, that bailments bear a strong analogy to *trusts*, which have been before described. In fact, courts of law have, in an eminent degree, applied to them the equitable doctrines which govern trusts. You will however observe that parties may make such express stipulations in regard to liability, as they please. The only question arises, when there are no express stipulations. Then the law deduces a contract from the nature of the transaction. The law of bailments, therefore, is chiefly the law of implied contracts. Bailments are divided into five sorts; namely, *deposits*, *mandates*, *loans*, *pledges*, and *lettings*. I shall speak briefly of each.

1. *Deposit*, or *depositum*. This is a delivery of goods to another to be safely kept until called for, without recompense. Here, if there be no special undertaking to the contrary, the trouble of safe keeping being without reward, the depositary impliedly undertakes for no more than slight diligence in keeping the *deposit*; and in case of loss or injury, is only liable for gross negligence. The terms *diligence* and *negligence*, being the opposites of each other, both admit of the same degrees, of which the law makes three. Thus *ordinary diligence* is that which men of common prudence use with respect to their own affairs; and the absence of it is ordinary negligence. *Slight diligence* is that which even careless men use with respect to their own concerns; and the absence of it is extraordinary or gross negligence. *Extraordinary diligence* is that which very prudent men use with respect to their own concerns; and the absence of it, is slight negligence. These specifications are perhaps as accurate as the nature of the subject admits of. A jury, looking at the circumstances of a case, will readily determine between these three degrees; and then the law will apply the rule. And the general rule is, that a depositary for safe keeping merely, without recom-

(a) The outline of the law of bailments, originally derived from the civil law, was indicated by Lord Holt, in the celebrated case of *Coggs v. Bernard*, 2 Lord Raymond, 909. Afterwards Sir William Jones wrote a small treatise on the subject, which every student ought to read, for the sake of its admirable style and analysis. The 40th lecture of Kent is also an excellent summary of this branch of law. But the recent treatise by Judge Story, will supersede the necessity of referring to any other source.

pense, only undertakes for slight diligence, as above defined; but the degree of diligence varies somewhat with circumstances. Thus if I deliver to you a box of jewels or precious metals, for safe keeping, and you know them to be such, you will be held to greater care, than if the articles had been less valuable. In other words, slight diligence in keeping gold, is more than slight diligence in keeping iron. So if you become the depositary in consequence of your own voluntary or officious proposal, you are held to greater diligence, than if the request had first come from the depositor; but still the general rule for this kind of bailments, is the equitable one above stated; that slight diligence only is required, and nothing but gross negligence makes the depositary liable.

2. *Mandate, or mandatum.* This is a delivery of goods to another, to have some act done with respect to them, in addition to safe keeping, without recompense. Here, then, are two things to be considered, *custody* and *feasance*. As to custody, the mandate does not differ from a deposit, and the rule of liability is the same. But *feasance* is the principal thing, and here, if there be no special undertaking to the contrary, the trouble of doing the thing required being without reward, the mandatary impliedly undertakes only for slight diligence, and is liable only for gross negligence. There is no liability for mere *nonfeasance*, or an omission to do the thing undertaken; but only for *misfeasance*, which is doing it improperly; or *malffeasance*, which is doing some other wrong. But the amount of diligence varies according to the nature of the thing to be done. Thus an undertaking to carry glass, requires greater care than to carry cloth; and an undertaking to repair a watch, requires greater care than to grind an axe. So where the very nature of the thing to be done presupposes a certain kind of professional skill, the mandatary is responsible for possessing that skill. Still the general rule is the equitable one before stated; that slight diligence only is required, and nothing but gross negligence makes the mandatary liable.

3. *Loan, or commodatum.* This is a delivery of goods to another, to be used by him, without recompense to the lender. Here, if there be no special undertaking to the contrary, as the benefit is all on the side of the borrower, he impliedly undertakes for extraordinary diligence, and is liable for slight negligence. He cannot apply the thing borrowed to any other purpose than that for which it was lent; he must take the utmost care not to let the article be lost or injured; and must return it when the lender calls for it. But he is not responsible for a loss resulting from inevitable accident. The three kinds of bailments now described, are called gratuitous bailments, because the benefit is all on one side, and the burthen on the other. In those which remain, there is a mutual benefit and interest.

4. *Pledge, or pignus.* This is a delivery of goods by a debtor

to his creditor, to be kept as a security till the debt be discharged. Here the bailment is mutually beneficial to both parties. The pledgor thereby procures credit, and the pledgee security. Therefore, there being no express agreement to the contrary, the pledgee undertakes for ordinary diligence in keeping the goods, and becomes responsible for corresponding negligence. If the article can be used without injury, he may use it; otherwise not. If the keeping of it be expensive, he may use it in a reasonable manner to defray such expense. But in either case if a profit be made, it must go in liquidation of the debt. As to the redemption of the pledge, we have remarked on this, when speaking of mortgages of personalty.

5. *Letting, or locatio.* This is a delivery of goods to another to be used by him for a compensation to be paid, or to have something done about them by him for a compensation to be received. This class of bailments is much more comprehensive and important than either of the preceding; and the above designation of *letting* does not very accurately indicate the nature of the contract. There are, in fact, three distinct subdivisions.

1. *Letting for use, or locatio rei.* This is where the letter, for a compensation, gives the temporary use of a thing to the hirer. Here the letter and hirer are mutually benefitted; the one gaining a right to the price, the other, to the use of the thing hired. Accordingly the hirer impliedly undertakes for ordinary diligence, and becomes liable only for corresponding negligence. He must use the thing hired for that purpose only for which it was hired; and must take ordinary care so to use, as not to abuse it. Then if loss occurs, he is clear; but if he departs from the use contemplated by the contract, he then becomes answerable for all casualties.

2. *Letting for work, or locatio operis faciendi.* This is where the receiver, who cannot properly be called hirer, is to do some work about the goods, for a compensation, either stipulated or reasonable. Here, both skill and care enter into the contract; and being mutually for the benefit of the employer and employed, the latter impliedly undertakes for ordinary care in keeping the article, and ordinary skill and diligence in doing the work; and he becomes liable only for corresponding negligence or deficiency. It often happens, however, that *custody* is the sole object of this bailment; and then it differs from the *deposit*, only in the fact of compensation; whence the difference in the degree of diligence. But when there is work to be done about the article, in addition to safe keeping, or *seasance* in addition to *custody*, then this bailment differs from the *mandate*, only in the fact of compensation; whence the difference in the degree of diligence. The most important bailees under this head, are *inn-keepers*. Who are inn-keepers, and what are their duties, must be determined by the common law. Our statute merely requires them

to take out a license from year to year, without specifying their duties. The following may be taken as a sufficient definition of an inn or tavern; namely, a house, the owner of which holds out that he will receive all travellers or sojourners who are willing to pay an adequate price, and are in a situation fit to be received. As a peculiar confidence is reposed in inn-keepers by their guests, to whom they are often entire strangers, they are placed by law under very high obligations. They are held responsible for the safe keeping of the property of their guests, from the moment of being brought to the inn, unless the loss or injury arise from the acts of God or of public enemies, comprising whatever comes under the head of inevitable casualties. In other words, they are bound for the highest possible degree of care and diligence. A theft by their servants does not exculpate them, because they are bound to keep honest servants. There are many details connected with their responsibility, but I have only room for the general principle.

3. *Letting for transportation, or locatio operis mercium vehendarum.* This is where goods are intrusted to a carrier, to be transported from place to place, for a compensation, either stipulated or reasonable. Here the transaction is mutually beneficial; and on the common principle, the carrier would impliedly undertake only for ordinary diligence, and be liable only for corresponding negligence. In fact this is the rule with respect to a *special carrier*, or one who only undertakes to carry goods in a particular case. But *common carriers*, or those who make a business of carrying goods, whether by land or water, have been placed, by the policy of the law, under the highest degree of responsibility. Their reputation for care and prudence cannot be known by the multitude whose goods they carry; and therefore they are held responsible for all losses or injuries, not resulting from the acts of God or public enemies. In other words, the degree of their responsibility, and the reason of it, are the same as in the case of inn-keepers. It is usual for them to sign a *bill of lading*, acknowledging the receipt of the goods, specifying the price of carriage, and agreeing to deliver them in good condition, at the end of their transit; but this does not vary the liability from that of the implied contract. If the articles are not in good condition at the end of the transit, the carrier is responsible, unless he can prove that the injury was done before he received them; for the whole burthen of proof falls on him. Nor can he vary his liability by any notice that he will only be responsible in a certain way. The policy of the law will not give effect to such a notice. The owners of stage coaches, steamboats, and railroad cars, are common carriers with respect to baggage, and subject to the general rules. As to the persons of passengers, they are only liable for injuries resulting from the want of ordinary care. But when an injury happens from upsetting, explosion, or the like,

the presumption is negligence, and the carrier has the burthen of proving due care.

§ 183. *Contract of principal and surety or guaranty.* (a) The contract of principal and surety or guaranty takes place, whenever one person, to procure credit for another, undertakes to be answerable for him. The original debtor is called *principal*, and the collateral debtor, *surety* or *guarantor*. The criterion of the contract is, that there is an original debt or duty for the payment or performance of which, a third person intervenes, by way of additional security. The surety does not take the place of the principal, and make the debt absolutely his own; but merely undertakes to pay in case the principal does not. We have seen that the fifth section of the statute of frauds, requires the contract of the surety to be in writing, because it is for the debt of another, and not his own debt. Like other contracts, too, there must be a consideration; but whether this must be expressed in writing, we have seen is doubtful. It is not necessary that the fact of being surety, should appear on the face of the writing; for it may be proved by parol. From what has been said of indorsers of negotiable paper, you will perceive that they become sureties for the parties before them on the paper, and differ in no respect from common guarantors, except that by becoming parties to the paper successively, each becomes a distinct, and not a joint surety, and is entitled to notice. The most common cases of sureties, strictly so called, are those of bail in civil and criminal proceedings, to be described hereafter, and of sureties in bonds for the performance of official duty. It follows from the nature of the obligation, that it cannot exceed that of the principal, though it may be less; that it must be for the same identical thing as that of the principal; and that it must be extinguished, by the extinction of the principal obligation. Any compromise, therefore, with the principal, by which he is discharged, discharges the surety: and any alteration in the terms of the original liability, without the consent of the surety, discharges him; for it is no longer the same thing for which he undertook. The most common instance under this head, is that of *giving time* to the principal. If the creditor, without consent of the surety, enters into any agreement, or does any act, by which he precludes himself from proceeding against the principal the moment the debt becomes due, he thereby discharges the surety: but mere delay to enforce payment, does not have this effect. If the surety is compelled to pay the debt, he has his action against the principal. If there be several co-sureties, and one pays the debt, the rest are liable to contribute their share; and for this purpose, we have seen that accommodation indorsers are held to be co-sureties in this state. At common law, the surety

(a) See 3 Kent, 121; Theobald on Principal and Surety; Pirman on Principal and Surety; Fell on Guaranty.

could not proceed against the principal, until he had first actually paid the debt; and he had no means of compelling the creditor to take any steps to hasten payment by the principal: but we have a statute for the relief of sureties and bail, by which a surety, by bond, bill, or note, being under apprehension that the principal may remove, or become insolvent, may notify the creditor in writing to sue the principal: and if he fail so to do, the surety will be discharged. But this statute does not include sureties for guardians, executors, administrators, or public officers. Also when a judgment is rendered against principal and surety, by our statute the latter may require it to specify that he is surety; and may have an execution first issued against the principal, until his property is exhausted, before proceeding against himself; and should he ultimately be obliged to pay the debt, he may at once sue out process against the principal, and have judgment rendered immediately upon the return of such process; instead of waiting until the next term, as in other cases.

§ 184. *Contract of insurance.* (a) The subject of insurance is one of vast compass and importance. It comprehends three principal subdivisions or branches; namely, *marine*, *fire*, and *life insurance*; on each of which, volumes have been written. The utility of insurance is beyond all question. It serves to equalize misfortunes, by distributing the effects of an individual calamity among many; or to shift inevitable losses from those who can ill afford to bear them, to those, who, in the aggregate, derive profit therefrom. It is therefore a contract highly favored by the law. We have no law prohibiting individuals from insuring, but the business is chiefly conducted by incorporated companies. The contract of insurance may be defined to be, a contract in which one party, for a stipulated sum, agrees to indemnify another, against certain risks or perils therein specified. The contract itself is called *policy*, from the Italian word *polizza*; the price paid for insurance, *premium*; the party insuring, *insurer* or *underwriter*; and the other party, *insured* or *assured*. I shall make some general remarks on each of the three branches of insurance above named.

1. *Marine insurance.* Here the object is indemnity against the *perils of navigation*. These perils are usually specified in the policy; and they may include all casualties to which the ship or cargo may be exposed, except those which good morals or public policy require should not be insured against. The most common perils are lightning, tempest, fire, shipwreck, capture, robbery, blockade, embargo, and barratry. *Barratry* here means fraudulent misconduct of the master or his mariners, without the consent or connivance of the owner; for no man can

(a) See 3 Kent, lecture 48, 49, 50; and the Treatises of Park, Marshall, Miller, Hughes, Ellis, and Phillips; the latter an American work.

insure against his own misconduct. Yet on the score of morality, the law of insurance is not over scrupulous; for it permits a party to insure against the perils incident to an *illicit* or *contraband* trade, as it respects foreign nations. The ordinary *subjects* of insurance are the ship, including tackle and furniture; the cargo and freight; and sometimes profits and commissions. Seamen are not permitted to insure their wages, because this would take away a strong stimulus to exertion. The propriety of allowing *wager policies*, where persons insure upon the mere hope or expectation of profit, without having any actual interest at risk, may well be doubted. Such policies are expressly prohibited in many places, and would probably come within our statute against gaming. Indeed, such policies are contrary to the fundamental idea of insurance, which is indemnity against loss; for there can be no apprehension of loss, when there is nothing at risk. Yet *wager policies* of this description have sometimes been sustained, when the underwriter knew that the insured had nothing at risk. There is a distinction between *open* and *valued* policies. An *open policy* is where the amount of interest is not specified, but left to be proved in the event of loss. A *valued policy* is where the parties have fixed a value to the subject insured, which shall be binding in case of loss. It is obvious that all *wager policies* must be *valued policies*; but the fact of valuation will not of itself sustain them; because the valuation in the policy is held not to be so entirely conclusive, but that the insurer may prove that the whole subject of insurance was never at risk. Still more then may he show that there was no interest whatever at risk. When a loss occurs within the perils insured against, it is either *partial* or *total*. It is usual to insert a memorandum in the policy that the insurer shall not be answerable for any *partial loss* within a certain *per centum*, commonly five. The object is to exclude trifling injuries; and sometimes, on certain articles liable to gradual deterioration, all *partial loss* is excluded, for the same reason. Where the policy is open, the value is estimated at the place of departure, adding expenses. The policy contains a special authority to the master to incur expense in preventing loss or saving property; and from the moment of disaster, he becomes the agent as well for the insurer as the insured. In adjusting a *partial injury* to the ship, where the insurer pays for the repairs, the rule is, to allow one third of the value of the new materials, for their increased value above the old. A *total loss*, strictly so called, seldom occurs; and when it does, the custom is to stipulate, that the insurer shall deduct a small *per centum*, say two or three, from the whole amount of insurance; in order to take from the insured all motive to desire a total loss, from the certainty of a full indemnity. But a technical total loss occurs, whenever the damage exceeds one half the amount at risk; because then the insured has a right *to abandon* to the insurer,

and proceed for a total loss. From the moment of such abandonment, the thing insured becomes the property of the insurer, and every thing is done at his risk and expense. The contract of insurance is pre-eminently one of good faith. The insured is bound to make a full disclosure, at the time of taking out the policy, of all matters affecting the risk, within his particular knowledge. And during the continuance of the risk, he must do nothing, by deviation, negligence, or otherwise, to increase the risk. The loss may have occurred before the insurance is effected, but the insured must not know this. The expression "*lost or not lost*," in the policy, does not save the insured, if he knew of the loss. There is also an implied warranty on the part of the insured, that the ship is in all respects *sea-worthy*, at the commencement of the risk; which includes not only a sufficient ship, tackle, and furniture, but also a sufficient master and crew. In case of *double insurance*, where policies do not stipulate the contrary, the rule of contribution applies, and each insurer contributes in proportion to his amount.

2. *Fire insurance.* Fire is one of the perils in marine insurance; but I speak now of insurance against fire on land. In this, however, there is little that is peculiar. The character and situation of the building, must be fully described by the applicant, and the purpose for which it is occupied; and no change in either can be made, by which the risk is increased. If the fire happen through the negligence, or the intentional act of the insured, the insurer is clear. The policy may be either open or valued, but is usually valued; and an insurance upon a building does not cover the moveables in the building, unless by express stipulation. Whatever is saved from the fire, goes to the benefit of the insured; that is, the insurer, to the extent of his undertaking, must make good the amount actually lost, and not merely the proportion which the amount lost bears to the whole amount. There is no such thing as abandonment for a total loss. The insurer may always repair, if he chooses; but the rule of one third new for old, does not here apply. It is usual to enumerate certain articles, and certain occupations, which, by reason of the very great hazard of fire, are excluded from the policy.

3. *Life insurance.* This is a contract by which the insurer, for a fixed premium, undertakes to pay a stipulated sum, if the person whose life is insured, die within the time for which insurance is effected. The sum paid, by way of premium, may be either a sum in gross, or a sum annually. The term of insurance may be either a given number of years, or for life; and the life insured may either be that of the person who procures the insurance, or that of any other person in whose life he is actually interested. The rules by which life insurance is governed, are founded upon a calculation of the average chances of human life, in certain regions, and they are as fixed and certain as any other

rules. The applicant is required to furnish a written answer to a set of queries relating to his age, habits, occupation, constitution, and the like; and similar queries are usually addressed to his medical adviser, and to some intimate friend. These answers become part of the contract; and any misrepresentation or concealment vitiates the policy. Restrictions are usually inserted, as to the places to which the insured may go; and should he go, without permission, to any of the prohibited places, the policy is forfeited. Death by suicide, duelling, or at the hands of justice, is likewise excepted from the policy. The warranty, that the person is in good health at the date of the policy, and has no disease tending to shorten life, is construed liberally for the insured; and only requires that he should have been in reasonably good health, and without any manifest and palpable disease. When one person insures the life of another, he is required to have a pecuniary interest in that life, to avoid the objection to a wager policy; as, for example, the interest of a creditor in the life of his debtor, or a husband in the life of his wife, and the like. It is a settled rule, that the death must occur within the period of the policy; and it will not be sufficient that the cause of death occurred within that period, if life continued beyond.

§ 185. *Liens.* (a) Lien is of French derivation, and signifies an obligation, tie, or claim attached to property, as security for a debt, and to that extent controlling the rights of the owner. I have included liens under the head of contracts, because though they may exist by the operation of law, they are usually created by contract, either express or implied. Liens may attach either to realty or personalty; and I shall consider both kinds, with reference to the various methods in which they may be acquired.

Liens by mortgage. We have already considered mortgages both of personalty and realty. I therefore merely name them under this head.

Liens by judgment or decree. The nature of liens by judgment and decree, and the proceedings which lead to them, will be considered hereafter.

Builder's lien. At common law ship-builders are the only class of builders who have a lien for their compensation, and this only continues while the ship is in their possession. Nor does it extend to those who furnish materials or make repairs, except when the ship is in a foreign port, where the owners are either not known, or not accessible. But by our statute of 1843 all persons who perform labor or furnish materials for constructing, altering, or repairing any building or vessel, may have a lien thereon, without retaining possession, by taking the required steps. To this end they must within four months after their claim accrues, make out a specific account, swear to it, and have it

(a) See Whitaker on Liens.

recorded in the recorder's office; and thus they secure a lien for two years from the commencement of their work or furnishing. During this time they may commence suit for their claims, and then the lien continues until final judgment and satisfaction. If the property upon which the lien attaches cannot be sold on execution, provision is made for leasing it until the lien is satisfied. Provision is also made for securing sub-contractors, in case the principal contractor does not pay them.

Vendor's lien. We have seen that the vendor of realty has an equitable lien thereon for the purchase money, unless, by taking collateral security or some other act, he evinces an intention to waive such equitable lien; and the rule is nearly the same with respect to the vendor of personalty before delivery. Unless it appear manifest, from the circumstances of the sale, that he intended to rely solely upon the personal credit of the vendee, he may retain possession of the chattel, until the purchase money be either paid or tendered.

Bailee's lien. It may perhaps be stated as a general rule, that a *bailee for reward*, has a lien upon the thing bailed, until payment of his compensation. If this be not universally true, there are very few exceptions. Of tradesmen it may be said generally, that whenever an article is delivered to them to exercise their trade upon it, they may retain it until payment of their charges. Thus, if you incur charges at an inn, the inn-keeper has a right to retain your baggage, until you pay your bill. If you commit goods to a carrier for transportation, either by stage, waggon, boat, or ship, he may retain them until his freight be paid. If you send a horse to a farrier to be shod, he may retain the horse until you pay him for his work. If you land goods on a wharf, or send them to a warehouse for storage, the wharfinger or warehouseman may retain them until payment of his dues. If you send cloth to a tailor to be made into a garment, he may retain the garment until you pay him his charges. These examples sufficiently illustrate the general principle.

Miscellaneous liens. Under this head, I shall enumerate a few liens which do not come within either of the foregoing classes. In the case of *salvage* at sea, the salvors have a lien upon the goods saved for their compensation, which is always liberal, in order to encourage the utmost exertions: but this right is limited to goods lost or exposed in the course of navigation, usually called *wrecks*. (a) The finder of things on land has no lien, unless the statute give him one. We have a statute, by which persons who take up *stray animals*, or *boats adrift*, have a lien thereon for their compensation, provided they take the proper steps, by advertisement and other proceedings. The master of a ship has no lien thereon for his wages, because he

(a) Abbot on Ship. 399.

engages upon the credit of the owners; but all the rest of the crew have such lien, and in a court of admiralty may prevent the ship from sailing, and even cause her to be sold, if their wages be not paid. (a)

General and particular liens. I have thus far spoken of what are called *particular liens*, as distinguished from *general*. The distinction is this: a particular lien extends only to the charge made upon the identical property then in hand; but a general lien is that which covers any general balance of account. Thus when you put your horse to a livery stable, the keeper only has a particular lien for the expense incurred at that particular time; but if you leave your papers with an attorney, he may retain them, not only for his fees for that particular service, but for his general balance of account against you. General liens are not favored in law: they exist only, by the long established usage of particular trades, or by express contract. Thus factors, wharfingers, bankers, insurance brokers, and attorneys, are said to have a general lien by the force of usage alone: and in any other case, if you notify those who employ you, that you will not receive property for the purposes of your trade, without a general lien, those who employ you with that notice, are bound by it.

When a lien does not exist. You cannot acquire a lien by a voluntary or wrongful act; for instance, if you pay charges upon goods for the mere sake of getting possession, you do not thus acquire a lien. Again, you cannot acquire a lien by misrepresentation. If by a false statement you obtain possession of goods, you cannot retain them, though money be actually due you on account of them. Again, you cannot acquire a lien, where the person who gave you possession had no authority so to do. Again, you cannot insist upon a lien, when there has been any agreement or other circumstance, from which it may be inferred, that you intended to waive the right of lien. Finally, you cannot acquire a lien by assignment from another; for as a general rule, a lien is a personal privilege, which cannot be assigned.

How a lien may be lost. With the exception of liens by mortgage or judgment, where possession does not usually accompany the lien, the general rule is that possession is essential to the existence of a lien. It would be highly prejudicial to the general interest of trade and traffic, if a lien could attach to goods in the market; because no one could know when he might safely buy them. It follows, therefore, that you lose your lien by parting with possession.

There are some other particular contracts, to which I have not adverted in this lecture. Maritime loans on *bottomry* and *respondentia* were referred to in the lecture on mortgages. The *charter party* and the general contract of *affreightment*,

(a) 3 Kent, 165, 197; Abbot on Ship. 475.

are peculiar to the law of shipping, and I have not room for a description of them here; and the same is true of the implied contract of *general average*, by which all the parties interested in a ship and cargo tacitly agree to contribute their proportions, if it becomes necessary to sacrifice a part of the cargo, for the safety of the rest. (a) Here then we close the consideration of property and contracts, which constitute the fourth division of these lectures.

(a) For all these maritime contracts, see the 42d, 45th, 46th, 47th, and 49th lectures of Kent; and Abbott on Shipping with American notes by Judge Story.

PART V.

THE LAW OF CRIMES.

LECTURE XXXIV.

CRIMES AND PUNISHMENTS IN GENERAL.

§ 186. *Preliminary considerations.* (a) We have now reached that division of our inquiries, which is usually denominated *criminal law*, and to which, under the head of *public wrongs*, Blackstone devotes the fourth book of his commentaries. The distinction between *civil* and *penal* sanctions has already been adverted to. Society does not invite obedience to its regulations by the offer of *rewards*, but deters from disobedience by the threat of *punishments*. It is therefore to the *terrors of the law* that our thoughts are now to be chiefly directed. We are to contemplate the dark side of the human condition, and make ourselves familiar with the consequences of transgression. To the philanthropic inquirer, this is perhaps the most interesting branch of legal study. I cannot indulge myself in tracing the history of criminal legislation in ancient and modern times; but I can assure you that there is no aspect in which the different ages present a greater diversity. An impartial survey cannot fail to conduct you to the gratifying conclusion, that mankind have been steadily improving in this

(a) It is not a little remarkable that we have no American treatise on criminal law. Kent does not touch the subject in his Commentaries. Swift, in his Digest, treats of crimes only with reference to Connecticut; and Tucker, in his Notes to Blackstone, only with reference to Virginia. Nor have we any thing like a full collection of reported cases. There are, indeed, criminal cases scattered through all our reports; but the only exclusively criminal reports of which I am aware, are Wheeler's Criminal Cases, the New York City Hall Recorder, a small collection of Virginia Cases, and separate Reports of certain celebrated cases, such as Burr's Trial, Selfridge's Trial, Goodwin's Trial, and the like. Add to these Davis' Precedents, a valuable collection of Forms designed especially for Massachusetts, Livingston's Project of a Criminal Code for Louisiana; and an article on Crimes and Punishments in the Encyclopedia Americana; and we have nearly all the sources of information peculiar to this country. But if we look abroad, the books are abundant. And among these, I would recommend Beccaria on Crimes and Punishments, Bentham on Legislation, and the fourth book of Blackstone, for the theory of criminal law; and for consultation and practice, the treatises of Hawkins, Hale, Forster, East, Chitty, and Russell, Archbold's Criminal Practice, M'Nally and Roscoe on Criminal Evidence, the English State Trials, and the Criminal Reports of Leach, Russell and Ryan, and Moody.

department of legislation. It is hardly a metaphor to say that the ancient codes were written in blood; whereas the characteristics of modern criminal jurisprudence are mildness, compassion and benevolence. In a word, humanity has kept even pace with the progress of civilization. In their anxiety to protect the life, liberty and property of the whole community from aggression, legislators have ceased to be altogether unmindful of the life, liberty and happiness of the offenders themselves. The divine attribute of mercy has been brought to temper justice, and sanguinary laws are found to be as unnecessary as they are hateful. In this country, at the present moment, we can hardly perceive a trace of that fierce and savage spirit which dictated the ancient penal codes. The grand problem in criminal legislation is to preserve the peace and order of society, with the least possible exercise of severity. All punishment is in itself an evil; but as disobedience of the laws is a still greater evil, there is a point beyond which humanity cannot safely go; and many affect to fear, that in this country that point has been passed; but I trust that such persons have not made due allowance for the natural tendency of good laws to protect themselves. As a general principle, it is only bad laws, which require very severe sanctions. Let all the regulations of society be wise and equitable, and they will go far towards sustaining themselves by their own intrinsic excellence; whereas obedience to laws which are palpably unjust, can only be enforced by the most terrific denunciations. I do not of course mean to intimate that, in any possible condition of society, penal enactments can ever be entirely dispensed with; but merely to assert the proposition, that the better the government becomes, the fewer will be the occasions of punishing transgression; and the view we are about to take of criminal law in this country will prove that I am correct.

§ 187. *The nature of crimes.* A *crime*, in its legal acceptation, signifies any act to which the law attaches a penalty or punishment, without any reference to its moral turpitude. The terms *offence* and *misdemeanor* are nearly synonymous, though commonly used to indicate a less degree of enormity. To constitute a crime, there must first of all be an *act*; since a mere opinion or intention, however wrong in a moral or religious point of view, if not carried into an act, cannot be treated as a crime; although the criminality of the act when done, may be partially or entirely dependent upon the intention of the actor. This results from that entire freedom of the mind, which is a fundamental condition of human nature. And although it will be found that most of those acts which the law declares to be *criminal*, are likewise *wicked* or *sinful* in a moral or religious view, yet it is because of their tendency to do temporal injury to society, and not because of their abstract wickedness or sinfulness, that human law interposes to punish them. This idea has

been sufficiently developed before. Every crime indeed involves a private injury as its immediate consequence; for society can only be reached through individuals. And the right to a civil remedy is only suspended, not annihilated, by making it punishable. In some instances, as we shall see, special provision is made for private compensation as well as punishment. But the true and only reason for making any given act a crime, is the public injury that would result from its frequent perpetration. Each single instance is an individual injury; frequent repetition would make it a social injury. Accordingly, society takes the most efficient measures for its prevention, by appealing to the fears of mankind. The crime is first accurately defined, and the requisite punishment meted out to it; and then government itself becomes a party to the prosecution of the offender, in order to insure its being carried into effect; for the certainty of punishment is even more effectual in preventing crimes, than any degree of severity with a probability of escape. But while the only legitimate object of punishment is to protect society against the repetition of crimes, humanity dictates that the reformation of the offender should also be effected, if possible. Yet as government has no concern with men, except as members of society, it is obvious that their moral improvement can never properly be made the primary object of punishment. Our constitution, therefore, uses loose language when it declares "that the true design of all punishment is to reform, and not to exterminate mankind." Certainly it is not to exterminate them; but neither is it to reform them, except incidentally; for this would be to encroach upon the province of the Almighty. Nor, on the other hand, can vengeance ever properly be an object of punishment, even in the slightest degree. To suppose this would be to clothe government with the attributes of a fiend. Self-protection, then, is at once the foundation and the end of the power which society exercises, of punishing its members. So true is this, that if a case could be supposed, in which it would be perfectly certain that an act, however atrocious, would never be repeated by the same or any other person, there would be no earthly motive for punishing it. In preventing the repetition of crimes, punishment is designed to operate both upon the individual offender, and upon the community at large. Upon the offender himself it operates in one of these ways, namely, by physically disabling him from repeating the offence; or by dissuading him from it through the recollection of past suffering; or by both of these together. Upon the community at large, it operates only by the terror of example. Hence it follows, that the mode and measure of punishment are to be determined, not so much by the abstract nature of the offence, as by its liability to frequent repetition; and also, that no act should be punished at all, the repetition of which does not injuriously affect the temporal welfare of society. In England and in several

of the states, the common law prevails in the punishment of crimes; and many acts are punishable from precedent, which have never been made so by legislative provision. (a) But the manifest evil of this doctrine is, that the majority of men, unskilled in the law, cannot be supposed to know beforehand, whether a given act will be criminal or not. In fact, the accumulation of precedents through the lapse of centuries, must render it difficult for the most consummate lawyer to be able to pronounce at once with certainty on the subject. And yet it is absolutely necessary to act upon the well known maxim, that ignorance of the law is no excuse for its violation; because, otherwise, ignorance would always be pretended. This consideration alone is sufficient to demonstrate the importance of requiring every offence to be defined by the legislature, together with its punishment; and accordingly it has become a fundamental doctrine in the federal courts and in the courts of this state, that they have no common law jurisdiction of crimes; and cannot treat any act as an offence, until the proper legislature has declared it to be such, and meted out the punishment. With regard to the federal courts, this doctrine, though sometimes doubted, rests upon the absence of any power in the federal constitution to punish crimes except in certain specified cases, before enumerated, for which Congress is to provide. And with regard to this state, the doctrine rests upon that clause of the constitution, which confers criminal jurisdiction upon the courts, "in such cases and in such manner as may be pointed out by law." This is construed to refer the subject of crimes to future legislative provision; and as our legislature has not adopted the criminal part of the common law, but has provided a substitute, it has therefore abrogated it. A different opinion has been sometimes entertained; but this is now the universal sentiment: and the happy consequence is, that on a few pages of the statute book, may be found enumerated all the offences which can be punished by the federal or state government, and the measure of punishment annexed to each. So that the only use now made of the criminal part of the common law, is to furnish the outlines of criminal procedure, and define the terms employed in the statutes. If there be any evil to be apprehended from this doctrine, it is that cases may arise in which men cannot be punished, though they richly deserve it, because the legislature has not anticipated their offences; but this objection weighs hardly a feather against the inestimable privilege of having every offence, for which punishment can be

(a) See *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415, and 1 Gallison, 488. As to Ohio, the matter rests on general admission: but see on the other side, *Ohio v. Lafferty*, Tappan's Ohio Rep. 81. Also, Judge Tappan's Charge published in the Ohio Federalist for Sept. 18, 1817, which called forth a Review, and afterwards a book, entitled, Principles and Maxims of American Jurisprudence, supposed to be by Judge Goodenow.

inflicted, distinctly and accurately defined; instead of being left to be collected from doubtful precedents, established in a very different state of society, and scattered at remote intervals, through the reported decisions of seven or eight centuries. The present condition of our penal legislation is this. First, we have an act for the punishment of *crimes*, including murder and all crimes punishable by imprisonment in the penitentiary, except two or three which are elsewhere provided for. This act contains a general provision for punishing those who aid, abet or procure; and another provision disfranchising the convict from the privilege of voting, holding office, or being a juror or witness, unless he obtain a general pardon, in all cases except man-slaughter and duelling. Secondly, we have an act for the punishment of *offences*, including a great variety of offences punishable by fine, or imprisonment in jail, or both; but there is no general provision against aiding, abetting, or procuring, nor for disfranchisement. Thirdly, we have an act for the prevention of *immoral practices*, and another for the prevention of *gaming*, including a variety of offences against good order and good morals, chiefly punishable by small fines. Fourthly, we have a great number of distinct penalties scattered through the statutes, relating mostly to the neglect of official duties, but including several other miscellaneous matters. It will thus be seen that, however excellent in other respects, our criminal law is greatly deficient in method and concentration. We have the disjointed fragments, but no complete system. And the same is in a great measure true of the criminal legislation of Congress. What we want, therefore, is a revised criminal code, in which all penalties should be brought together and arranged in some similar and systematic order. And in framing this code occasion might be taken to correct an evil in our mode of defining crimes, which I will here point out. Instead of giving such general definitions as will include all cases coming within the reason of the law, our legislature has undertaken to enumerate, in each case, the particular subjects, with respect to which the offence may be committed. For example, in defining forgery, instead of using some general term which would include all matters that may be forged, and not exclude any, the statute attempts to specify every writing which can be the subject of forgery. The same is true of the definitions of perjury, larceny, arson, burglary, and many other offences. Now, to say nothing of the want of brevity in this mode of definition, the obvious objection is, that no legislative foresight can be expected to particularize so fully as not to omit any thing coming within the principle. And yet on the maxim, that where enumeration is attempted, all particulars not mentioned are excluded, it follows that if a single particular be omitted, there can be no punishment for that case. Finally, the framing of such a code as is here suggested, would furnish the best possible opportunity for making

any other improvements suggested by experience. In a system so arranged, the slightest want of harmony or symmetry would at once be seen ; and although absolute perfection could not be attained, this would be the surest method of approximating towards it.

Again, not only must all offences be expressly provided for by the legislature, but the law must be made before the act is committed. In other words, there can be no *retroactive criminal legislation*; and this doctrine prevails throughout the United States. Both the federal and state constitutions, as we have seen, prohibit the enactment of *ex post facto* laws; and by these are meant retroactive criminal laws. (a) Any law, therefore, which makes criminal an act which was innocent at the time of its commission ; or which aggravates the punishment of a crime, after its commission ; or which renders conviction more easy, than it was when the crime was committed, would be unconstitutional and void. But it is presumed that laws which favor the offender, by diminishing the punishment, or rendering conviction more difficult, would be valid, although retroactive ; because they are to operate for the benefit of the accused. The result is, that we enjoy the glorious privilege of knowing that the past is secure, so far as punishment is concerned. Under no state of excitement, can a vindictive legislature animadvert upon past transactions. If we take care to escape existing penalties, we need be under no apprehension as to retrospective ones. But with regard to the acts which may be declared criminal, there is no express constitutional restriction, either upon Congress or the state legislatures. This is properly left to be determined by the exigency of time. Whatever act, therefore, tends to injure society, in a degree sufficient to attract public animadversion, may be declared criminal ; but with regard to the mode and measure of punishment, as well as the forms of proceeding from the commencement to the conclusion of a criminal prosecution, there are, as we have seen, a variety of constitutional provisions, all tending to secure the offender against unnecessary suffering. All these provisions have been commented upon in connection, and will be referred to again. I shall here merely recapitulate those which relate to the mode and measure of punishment. 1. Excessive *fin*es, cannot be imposed. 2. Neither *cruel* nor *unusual* punishments can be inflicted ; that is, there can be no unnecessary torture or barbarity in administering punishment ; and no exercise of invention in devising new modes of punishment. 3. Banishment cannot be resorted to, as a mode of punishment. 4. There can be no corruption of blood or forfeiture of estate ; or, in other words, the consequences of punishment must terminate with the person of the offender. The result is, that our criminal code cannot fail to

(a) See *Calder v Bull*, 3 Dallas, 386.

be humane, so long as the constitution endures. As the power of punishment is the most dangerous to the safety and liberty of the citizen, with which any government can be intrusted, so no power has been guarded with more scrupulous jealousy by all the American constitutions. In this respect we have immeasurably the advantage of all other nations, ancient or modern, as will be abundantly evinced in the course of our observations. In the two great points of simplicity and humanity, the criminal code of this state, for example, might safely challenge a comparison with any code in the civilized world. It often wants method and congruity in its structure, but the principles upon which it is framed, are such as philanthropy must ever contemplate with satisfaction.

§ 188. *Modes of punishment.* The punishments now in use may be divided into four classes, namely, corporal punishments, fine, imprisonment, and death. Of these in their order.

Corporal punishment. Perhaps confinement in the *stocks* and *pillory* would hardly rank among corporal punishments; their object being disgrace, rather than pain. These punishments, however, once so prevalent, have nearly, if not entirely gone out of fashion, in this country; whether wisely or not may admit of much doubt. There are some offences, for which disgraceful punishments would seem to be peculiarly appropriate; and there are many persons upon whom they would operate with peculiar efficiency. But by corporal punishment we commonly understand *whipping, branding, cropping*, and the like. These, however, like the other, have nearly ceased to be inflicted. Whipping is indeed authorized in two or three cases, under the acts of Congress; and is practised to some extent, in several of the states; but in this state there has been none of it since 1815. The fact is, the spirit of the age is opposed to corporal punishment in every shape. There is too much of the appearance of savage ferocity, in causing the human body to smart and bleed under the lash or the iron. Such things are bad enough for brutes; they are too bad for men. This at least seems to be the growing opinion of the age; and it speaks well for the march of humanity.

Fine. Punishment by fine is very generally practised throughout the United States. The constitution sanctions moderate fines, by declaring that they shall not be excessive. These considerations should induce one about to question their expediency, to doubt the correctness of his own judgment; nevertheless I cannot help regarding mere pecuniary punishments as impolitic, at least, if not unjust. If we can forget the imposing authority of usage, and view the matter as a new proposition, we shall see that punishment by fine practically amounts to a sale of criminal licenses. Government virtually says that for so much money, so much crime may be expiated. The question for the citizen, not

otherwise restrained, is, can he afford to pay the price? The answer will depend upon an examination of his purse. If he be rich, the penalty is nothing; if poor, it may amount to a prohibition; so that a fine operates as a great punishment, a small punishment, or no punishment at all, according to the state of the offender's coffers. This inequality is one strong objection; and another is that government is strongly tempted to push punishment to extremes, when paid for it in the receipt of fines. This danger may be small in this country, at this time; but under a corrupt government, what an alacrity to punish would this motive produce. We know that there have been times, when all crimes, however atrocious, could be expiated by money; and that corrupt governments have thus managed to draw an immense revenue from the depravity of their subjects. Even false accusations have been invited, in the most effectual manner, by giving the informer one half the fine; but to the honor of our laws be it said, they hold out scarcely any encouragement to that most despicable class of men, mercenary informers. With some trifling exceptions, they hold out no other motive to citizens to inform against transgressors, than that which they find in their regard for the public good. They even discourage informations without manifest cause, by a provision to be mentioned hereafter, which exposes the wanton or malevolent informer, to the payment of costs; and our experience has thus far proved, that the office of informing may be safely left to the public spirit of a high-minded people, without the temptation of a bribe; but I shall not pursue this topic. Since fines are so much in favor, we have reason to rejoice that they cannot be excessive; and must content ourselves with this assurance.

Imprisonment. This punishment is effected either in *penitentiaries*, which are state prisons; or in *jails*, which are county prisons. The United States have no prisons, but make use of the prisons of the different states with their consent. As a mode of punishment, imprisonment has many strong recommendations. *First*, there is a peculiar fitness and propriety, in withholding the benefits of the social compact from those who have violated its obligations. Society guarantees our civil liberty, on the condition that we obey and uphold the laws made to protect it. If therefore we break this condition by transgressing these laws, the deprivation of liberty is a just and natural forfeiture. Society enters, as it were, for condition broken, and resumes its grant; while the offender is left to learn from the loss of liberty, how great is its value. *Secondly*, imprisonment operates more equally than any other punishment upon all descriptions of persons; since liberty is of very nearly the same priceless value to every one. *Thirdly*, imprisonment is more efficient than the punishments before described; since it physically disables the offender, for the time being, from continuing his depredations upon society. The

man who has been whipped or fined, is forthwith let loose upon society, with the power, and probably a disposition sharpened by exasperation, to repeat his transgression. But the man who is immured between prison walls, cannot do harm. *Fourthly*, imprisonment admits of all degrees of severity, and can therefore be graduated better than any other punishment, to meet all offences. It may take place in the gloomy dungeon or the cheerful light; it may be at hard labor or listless ease; it may be solitary, or in the company of other offenders; and it may be for any period, from a single hour to the whole of life. For these, and perhaps other reasons, imprisonment is unquestionably the best of all the methods of punishment. Moreover, convicts are not unfrequently compelled to support themselves by their own labor, and thus relieve the public of the burthen. In our penitentiary, "hard labor" is always a part of the sentence; in our jails it is not; but the expense of aliment is there trifling, being confined by the sentence to "bread and water." Of late, public sentiment has been strongly inclining in favor of solitary imprisonment; and there are three strong arguments in favor of it. *First*, the convict cannot corrupt, or be corrupted by others, having less or greater experience in crime than himself; whereas promiscuous imprisonment must necessarily operate to some extent, as a school for crime, even where prison discipline is the most perfect. *Secondly*, in solitary confinement there is always some prospect of reformation; and this should always be kept in view as a secondary object of punishment. Of this at least we may be sure, that if in the long and lonesome hours, during which the solitary prisoner's mind must be thrown back upon itself, for want of other objects to fix it upon, reflection does not make him better, he is beyond reformation by any human means, and may be given up as a hopeless reprobate. *Thirdly*, solitary imprisonment is more effectual, as an example, than promiscuous imprisonment. It is sad for man to be alone under any circumstances; but in a prison it must be terrible. To be convinced of this, we need not resort to the high-wrought picture of Sterne's captive; we need only to think of man's social nature. The imagination cannot conceive of a fate more utterly appalling than that of solitary imprisonment for life. What are the momentary pangs of the most painful death, in comparison with the unutterable despair of entering a dungeon, never to come out? This is indeed a living and enduring death. It has all the awfulness of actual death, without its speedy oblivion.

Death. This is the last resort of the law. In this country, except under the military law, the punishment of death is always inflicted by hanging; the sheriff or marshal, as the case may be, is the executioner; and in order that even this punishment may not come within the prohibition of "cruel," it is attended by none of those aggravations of barbarity and torture, which strike us

with such horror in the codes of other countries. Formerly executions were always *public*, under the belief that the example must have a salutary effect upon the thousands who throng to witness such spectacles; but this opinion is gradually changing in favor of *secret executions*; and I think the change a wise one. For the victim himself, there is no doubt that a secret death is best; because his thoughts are not drawn off from the contemplation of his awful situation, by the desire to make a last exhibition of hardihood, which the vulgar will applaud as heroism; and as to the rest of the community, it would seem that the tolling of a bell, or the mere announcement in a newspaper, without any of the pomp and parade, which make us forget the crime, in our sympathy with the criminal, is calculated to produce at least as salutary an effect, as a view of his struggles, in the presence of a noisy crowd. But another question of much more importance is beginning to attract public attention; namely, ought death to be in any case inflicted as a punishment? Without attempting an elaborate discussion of this question, I shall briefly indicate the leading views entertained on each side. The question is twofold; first, as to the *right*; and secondly, as to the *expediency*, of capital punishment.

Those who maintain that society has the *right*, place it on the ground of self-defence. They admit that a strong necessity must exist, before society can be justified in taking the life of its members; but when such a case does arise, the right of self-defence takes precedence of every other, and the life that would be dangerous to society may be rightfully terminated. They also find authority for the exercise of this right, in the Old Testament, and in the general practice of mankind. On the other hand, those who deny the right, reason in this way. Society, they say, has no power but that which it derives from the consent of its members. But life is one of the *unalienable* rights of man. He cannot part with it if he would, until his Creator calls for it. No man can give a valid consent to his own death. As between individuals, the most unequivocal consent would not shield the slayer from the guilt of murder; and if one individual cannot authorize another to take his life, he cannot authorize society to do it. Society therefore cannot have derived this power from consent; and consequently has it not. Nor can the doctrine of self-defence be the foundation of such a right; since no individual can endanger the existence of society. Self-defence authorizes one person to take another's life, in order to preserve his own; it is purely preventive, and has nothing to do with punishment. But society can never be placed in this predicament towards an individual, and therefore can never have occasion to kill in self-defence. Again, the language of scripture brings no aid to the argument, because none is more solemn and explicit, than that which says, "Thou shalt not kill." Besides, the doctrine of governing men

by divine right is now exploded; and the fact that Jehovah, the author of life, in his immediate government of a peculiar people, did authorize the punishment of death, by no means justifies the inference that he has delegated this power to human governments. Such arguments, drawn from the ancient theocracy, would prove vastly too much; and therefore cannot be used; and the same may be said of the argument from custom. What wrong can be named, that custom has not, at some period, sanctioned? Such briefly are the arguments for and against the right of capital punishment.

And the question of *expediency* is equally debateable, when the right is conceded. The great argument in favor of death as a punishment, is the terrific example it holds out to others. Not only does death render it certain that the same offender will never repeat the offence; but it has the strongest possible tendency to deter others from committing it. On the other hand, however, it is urged that the same result may be attained without inflicting death. Solitary imprisonment for life renders it almost equally certain that the offender will not repeat the offence; and as a terror to others, it is scarcely less effectual than death itself. At the same time, our sentiments of humanity are much less shocked at seeing the prison doors close for ever upon a fellow-creature, than at seeing him suspended from the gallows. We feel that he has a space for repentance and reformation; instead of being sent suddenly away, reeking with guilt, to the presence of his final Judge. We also feel that he may after all be innocent: so uncertain is human testimony. We know that innocent men have often been condemned and executed; and in such cases an infinite wrong has been done, without the possibility of undoing it. The vital spark has been rashly put out, and all earth cannot rekindle it: whereas the prisoner, when his innocence is discovered, can be set free, and thus be indemnified, in some degree, for the wrong he has sustained. These considerations, and others of a similar nature, are strongly turning public sentiment towards the abolition of capital punishment. The experiment was made by Catharine of Russia, and is said to have been entirely successful.

Apportionment of punishment. Having thus described the actual modes of punishment now in use, the question arises, how these punishments are to be apportioned, so as to be just sufficient for each offence, and no more; for that punishments ought to be thus apportioned, if possible, is self-evident. On this point, I may quote with satisfaction the following declaration of our state constitution:—"All penalties shall be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crime of theft, forgery, and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction between the crimes themselves, and to commit the

most flagrant with as little compunction as they do the slightest offences." But to effect the desired apportionment, not only as to different offences, but also as to different degrees of the same offence, has proved the most difficult problem in criminal legislation. In fact, while reason teaches that the degrees of criminality must be almost infinitely various, experience at the same time proves that no human legislation can specifically provide beforehand, for those minute and shadowy differences. To remedy this defect, therefore, recourse is had to judicial discretion. Whenever the nature of the punishment admits of degrees, which is the case with all but death, a limited discretion is given to the judges, as to the amount of punishment. The law fixes the extremes; that is, it prescribes for each offence, the largest and smallest fine, and the longest and shortest time of imprisonment; and between these extremes judicial discretion is permitted to range, for the purpose of adapting the punishment to the aggravating or palliating circumstances of each case. Perhaps a safer depository of this delicate power could not be suggested, whether we consider the rights of the public or the offender. Humanity being a prevailing sentiment, the presumption is, that if judges are biassed at all, it will be in favor of the criminal; he therefore will have nothing to complain of: and on the other hand, the public are protected against the consequences of too much lenity, by having the limits of judicial discretion in all cases ascertained by the statute. But in this connexion, there is one important defect both in the state and federal provisions, which ought to be mentioned. It is, that with one or two exceptions, no provision is made for punishing a second offence, more severely than the first; though the propriety of so doing is self-evident; for the very fact of repetition by the same offender, proves that the first punishment was not sufficient.

§ 189. *Who are exempted.* (a) The general rule is, that no person who commits an act made punishable by the law, is exempted from liability to the punishment prescribed. But to this rule there are several exceptions, founded on the absence of *criminal intention*. The principle is, that in the perpetration of a crime, the mind must concur with the body, the will with the muscular organs, or the actor is not to be held responsible. If, therefore, either from imbecility, insanity, mischance, or necessity, one does an act which would be criminal if done intentionally, he stands excused, on the ground of having no criminal volition. Thus *idiots* always, *lunatics* during the intervals of insanity, and *infants* while too young to know the distinction between right and wrong, are held excusable for those acts which would otherwise be punishable, because they cannot harbor a criminal design; but *drunkenness*, which is a voluntary insanity, is no excuse. Again, if the act which would otherwise be criminal, is

the result of an *accident* or *mistake*, which the law calls *mis-chance*, the actor is not responsible, because he did not do it wilfully; but mere ignorance of the criminality of the act, when the act itself is done intentionally, is no excuse; because every person of sound mind, is held bound to know what acts are declared by law to be criminal. Lastly, if the act which would otherwise be criminal, be the result of *inevitable necessity*, the actor is excused, because he could exercise no volition. Thus, if the compulsion be physical, or if it result from an injunction of law, the exemption is absolute. But the command of no superior, except the law, can excuse the commission of a crime; for there is no necessity for obeying such a command. It was indeed formerly held, as we have seen, that a wife was excusable for concurring with her husband, on the ground of constraint; but this absurd idea is now nearly exploded. There is however a species of moral compulsion, which the law always allows to palliate, and often to excuse, the commission of a crime. Thus where the act is done strictly in *self-defence*, it is excused on the ground that the actor, in violating a human law, did but obey a still higher law. So where an act is done in a moment of strong and overpowering excitement, before the passions, suddenly provoked, have had time to cool, the guilt, if not wholly excused, is greatly palliated, out of regard to the infirmity of our nature. It has often been made a question, whether extreme want of food, clothing, or shelter, ought not to be a justification of the acts done to relieve immediate necessities. Humanity would incline us to answer in the affirmative; but the plea of want, if once allowed, would open so wide a door to depredation, that the policy of the law is against admitting it. I have thus briefly indicated the general principles upon which crimes are palliated or excused, for want of criminal intention in the perpetrator. The application of these principles will be made, when we come to the description of crimes.

§ 190. *Principals and accessories.* (a) We have already seen that, to constitute a crime, there must be an act. In perpetrating this act, more persons than one may be concerned; and they may be concerned more or less directly. This has led to some important distinctions. He who directly and absolutely perpetrates the act, is denominated *principal in the first degree*. He who is present aiding and abetting, is denominated *principal in the second degree*; and this presence may either be *actual*, as where one stands immediately by and assists; or it may be *constructive*, as where one keeps watch at a convenient distance. Again, he who is neither chief actor, nor actually or constructively present, may still be guilty of participating in the perpetration or in its results; in which case, he is denominated an

(a) See 2 Swift's Dig. b. 5, chap. 14; 4 Black. chap. 3.

accessory. If he procure, advise, or command the act to be done, he is an *accessory before the fact*. If, knowing the act to have been done, he receives, comforts, or assists the criminal, or shares in the avails of the crime, he is an *accessory after the fact*. And the general rule has been that though an accessory cannot be punished until the principal has been convicted, yet then he is liable to the same punishment as the principal. But the distinction between principals and accessories applies only to crimes standing in the middle rank of guilt; for in treason, on account of its magnitude, and in petty offences, on account of their littleness, all participators have been treated as principals. Such are the doctrines and distinctions of the common law; and it would not be difficult to show that some of them are arbitrary, and all of them unnecessary. For why make these distinctions in name, when the criminality and punishment are the same? If the distinction be well founded in middling crimes, why not extend it to all? And why allow the accessory to escape, merely because the principal cannot be found? But these distinctions are greatly modified in this state. We have a general provision, that if any person "*aid, abet or procure*" another to commit any offence punishable with death or imprisonment in the penitentiary, he shall be liable to the same punishment as the chief actor would be liable to, if convicted. This provision embodies the essence of the common law distinctions without their complexity or arbitrariness; and there are similar provisions in the federal code. But they are all defective in one respect; they do not extend to all offences; though there can be no good reason for excluding any. In fact there are several special provisions designed particularly to remedy this imperfection. But why might there not be, in place of all these, one universal provision, punishing all who aid, abet, procure, or participate, with the same punishment as those who actually perpetrate the offence; and inflicting this punishment whether the chief actor be found or not? Such a provision would be at once simple and comprehensive; and I can perceive no objection to it.

§ 191. *Improvements suggested.* From the general views now presented, it will be seen that though criminal law has undergone important changes in this country, all of which are very decided improvements, yet many deficiencies still remain to be supplied. In addition to those already indicated, the want of a general provision for *compensation* to the injured party, where the case admits of it, is worthy of notice. There are some special provisions to this effect; but the principle thus recognized, should be made universal. In all cases but homicide, compensation of some sort can be made to the individual himself; and in the case of homicide, it might be made to his family. Where the offender is able, this compensation should be made by him as a part of his sentence; and where he is unable, the principle of equality

would seem to require that it be made at the public expense. Another very important desideratum is, a more general uniformity in the criminal laws of the different states. So great is the present diversity, that in contemplating it, one might almost be tempted to suppose that criminal legislation is an affair altogether arbitrary and capricious; not governed by fixed and immutable principles, but varying like climate, with geographical limits. Yet surely this is not the fact. The diversity does not spring from the nature of the subject. What is criminal in Maine should be so in Louisiana. There is no where a sufficient difference in the social condition, to make any important difference in criminal legislation. But whatever be the cause of the diversity, it does exist to a remarkable extent; and among many evil consequences, one not the least to be regretted, is, that it becomes a matter of calculation among the vagabond portion of our community, who live by preying upon society, in which of the states they may commit the greatest number of outrages, with the fairest prospect of mild punishment or entire impunity. Accordingly, that state which ventures to be most humane, will be most likely to be thronged with rogues and knaves; since in addition to the usual proportion of its own population it must bear the burthen of immigration from those states where the laws are more sanguinary. But we are not without hope, that time will bring about a greater degree of uniformity. Throughout the civilized world, the spirit of inquiry and reform is now more generally directed to the subject of crimes and punishments, than to any other matter affecting our social condition. Commissioners are appointed to visit distant regions, and compare criminal codes; and a general improvement must be the ultimate result.

LECTURE XXXV.

CRIMES UNDER THE STATE LAW.

§ 192. *General division of crimes.* In this lecture I propose to consider the principal offences punished by state legislation, but without attempting a complete enumeration. And at the very outset I find difficulty in selecting any suitable classification. The most general division of crimes is into the three following classes. 1. *Crimes affecting the public welfare.* The theory of criminal law is, that all crimes affect the public welfare; otherwise society would not interfere with them. But there are some which have this tendency much more directly and immediately

than others. Such are all those offences against the justice, health, morals, peace, and property of the public, which do not directly affect either the persons or property of individuals. 2. *Crimes affecting private persons.* The personal rights of individuals, expressed in general terms, include life, liberty, health, reputation, and happiness, which, as we have seen, are declared in our constitution to be natural, inherent, and unalienable rights. All offences, therefore, which tend directly to injure or destroy either of these rights, would fall within this class. 3. *Crimes affecting private property.* This class would of course include all offences having a direct reference to the property of individuals. In the present lecture my object is to present a mere sketch of the crimes punishable in this state, in the order indicated by the above classification. The minor offences will be barely referred to, for the purpose of grouping them together. Of the higher offences I shall speak somewhat more at length. And although the subject of indictments belongs properly to a future lecture on criminal procedure, I shall so far anticipate that subject here, as to give, in connexion with some of the higher offences, that part of the indictment which describes the offence. If the student will particularly note this technical description of the offence, he will be enabled the more accurately to remember in what the offence consists. I have before said that an indictment is a formal accusation of an offence, drawn up by the prosecuting officer, and found to be true by a grand jury; and that no man can be put upon his trial upon any criminal charge, until such an indictment has been found against him. The caption and conclusion of the indictment, which are merely formal and the same in all indictments, will be omitted, and only that part given which describes the offence.

§ 193. *Crimes affecting the public welfare.* Under this head I shall consider a variety of offences, which scarcely admit of a more particular classification. In defining them, especially those of the minor sort, I shall use all possible brevity.

Perjury and subornation. (a) To understand the nature of

(a) *Indictment.* That heretofore to wit, at the court of —, begun and holden at — in the county aforesaid, before the [presiding judge,] on the —, a certain action of trespass for assault and battery was pending, in which — was plaintiff, and — was defendant; in which action issue had before that time been joined; which issue then and there came on to be tried by a jury of said county in due form of law; and then and there, upon the trial of said issue, one — being produced as a witness on behalf of said plaintiff, did make oath before the said [presiding judge,] who was then and there duly authorized to administer such oath, that the evidence which he should give to the said court and jury, touching the matters in question on the said issue, should be the truth, the whole truth, and nothing but the truth; and it then and there became a material question, upon the trial of said issue, whether the said defendant had struck the said plaintiff, and how many blows; and thereupon the said — did then and there, under the oath aforesaid, falsely, wilfully, and corruptly declare, that he the said — did see the said defendant on — a', —, strike the said plaintiff six blows with his fist; whereas in truth and in fact the said — did not see said

perjury, we must first consider the purpose of an oath. The dictionary definition of an oath is—"an affirmation, negation, or promise corroborated by the attestation of the Divine Being." But in terms, an oath differs from an affirmation in this:—an oath is a direct appeal to God for the truth of what one says, or the performance of what one promises; while an affirmation appeals only to the pains and penalties of perjury. The one presupposes a belief in a future retribution: the other does not. The law requires an oath or affirmation from three classes of persons, namely, witnesses, jurors, and public officers; and as many persons have conscientious scruples against taking an oath, it is in all cases optional to affirm. Which is the more binding upon the conscience, is a question which the conscience alone can answer; but it would seem that every human being is at all times under so strong a moral obligation to tell the truth and perform his promises, that no act of his can increase it. At any rate the legal sanction of both is the same, namely, the pains and penalties of perjury. We say then that the purpose of the law, in punishing perjury, is to secure the telling of truth and the performance of promises, in all things pertaining to the administration of justice, by an appeal to purely temporal sanctions, operating equally upon believers and unbelievers in a future retribution. According to Blackstone, (a) perjury is "when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question." This definition involves four distinct matters. 1. The oath must be administered by some person authorized by law. 2. It must be in some judicial proceeding. 3. The person must knowingly swear falsely. 4. The false swearing must be in relation to some material matter. In this state perjury is made to consist in wilfully and corruptly declaring, under oath or affirmation, any matter to be fact, knowing the same to be false, or denying any matter to be fact, knowing the same to be true; such oath or affirmation being administered by a person and upon an occasion authorized by law. The punishment is imprisonment in the penitentiary from three to ten years. The statute undertakes to specify all the cases in which perjury can be committed, instead of saying generally all cases in which the law authorizes an oath or affirmation; but in other respects the definition does not differ essentially from that of Blackstone. It suggests, however, the following queries. 1. If a person not having certain knowledge, swear against his belief, or without having any belief,

defendant on —, at —, or at any other time or place, strike the said plaintiff at all, with his fist or otherwise; but the said declaration of the said —, under oath as aforesaid, was then and there wholly false and untrue, as he the said — then and there well knew; and so the said — did then and there, in manner and form aforesaid, commit wilful and corrupt perjury.

(a) 4 Black. 137

would this be within the definition? 2. Since the oaths and affirmations of jurors and public officers are not statements of fact, but promises, are they within the definition? If either of these questions be answered in the negative, the definition is defective, and ought to be amended. *Subornation* of perjury consists in procuring another to commit perjury, and would consequently be included in any general provision against aiding, abetting, or procuring. The punishment is properly made the same as for committing perjury. Formerly an indictment for perjury was exceedingly voluminous; it being held necessary to set forth the authority under which the oath was administered, together with a complete record of the proceedings in which the oath was taken; but these are dispensed with by our statute, and it is made sufficient to set forth the substance of the offence.

Bribery. In the ordinary acceptation of the term, bribery consists in hiring or being hired to swerve from public duty; and it would be easy to make one general and comprehensive provision against bribery under all circumstances, punishing equally him who offers and him who receives a bribe. Such a provision should embrace electors, jurors, witnesses, and all public officers. But our statute falls far short of the generality here proposed. It punishes bribery in the following cases. 1. Attempting to influence a juror or witness, directly or indirectly, either by promises or threats—fine within five hundred dollars, and imprisonment within thirty days, for both parties. 2. Bribing a judge, justice, or arbitrator, in a matter pending before them—fine within one thousand dollars; but nothing is said against taking the bribe. 3. Bribing an officer or other person having an offender in custody, to permit his escape—fine within two hundred dollars; but nothing is said against taking the bribe. 4. Bribing a voter at an election—fine within five hundred dollars and imprisonment from one to six months, but nothing is said against taking the bribe. 5. A county commissioner taking a bribe in the execution of his office—fine between three hundred and one thousand dollars. In all these cases, the thing given or taken as a bribe, may either be money or any other valuable thing, or the promise thereof.

False personation. If any person with fraudulent intent, falsely personate another, that is, take the name of and pretend to be another, in any judicial proceeding, or in the acknowledgment of a deed or power of attorney, or in procuring a marriage license, the punishment is imprisonment in the penitentiary from one to six years. The object of this provision is to guard the public against impostors, in those weighty matters, in which successful imposition would be most deleterious.

Refusing to testify. Being legally called upon to testify, and refusing to take the oath or affirmation—imprisonment until submission, and fine within twenty dollars.

Refusing to assist officers. 1. Being legally called upon by the sheriff or other officer, to aid him in arresting or securing an offender, and refusing so to do—fine within fifty dollars. 2. Refusing to assist in quelling a riot—fine within twenty-five dollars.

Resisting officers. Resisting or abusing any judge, justice, sheriff, constable or other officer, in the execution of his office—fine within two hundred dollars, or imprisonment within twenty days, or both.

Taking unlawful fees. Any officer, judicial or ministerial, knowingly receiving any other fee or reward for doing his duty, than that which the law prescribes—fine within two hundred dollars, or imprisonment within ten days, or both; and disqualification for seven years.

Stirring up suits. Any judicial or ministerial officer of court, or attorney, stirring up or encouraging any suit, quarrel, or controversy, with intent to injure the persons litigating—fine within five hundred dollars, and civil liability in treble damages.

Aiding in the escape of prisoners. 1. Any officer in the penitentiary, procuring, aiding, or abetting any convict to escape—same punishment as the escaped convict. 2. Any other officer voluntarily suffering an offender in his custody to escape—fine within five hundred dollars, or imprisonment within ten days, or both. 3. Any person rescuing or attempting to rescue an offender from custody—same punishment.

Usurpation of office. Assuming to be an officer without authority—fine within two hundred and fifty dollars, and imprisonment within ten days.

Oppression in office. Wilfully injuring, defrauding or oppressing another, under color of office—fine within two hundred dollars, and civil liability in treble damages.

Offences connected with elections. 1. A resident of any county voting in any township of such county, in which he does not actually reside—jail from six to twelve months. 2. A resident of the state voting in any county, in which he does not actually reside—penitentiary from one to three years. 3. Voting more than once at the same election—penitentiary from one to five years. 4. A resident of another state voting in this state—penitentiary from one to five years. 5. Voting without having the qualifications of an elector—jail from one to six months. 6. Procuring, aiding, or advising another to vote contrary to law—fine from one hundred to five hundred dollars, and jail from one to six months. 7. Procuring, aiding, or advising another to go, for the purpose of voting, to a place where he has no right to vote—penitentiary from one to five years. 8. Influencing or attempting to influence a voter, by bribery or threats, to vote contrary to his inclination—fine from one hundred to five hundred dollars, and jail from one to six months. 9. Deceiving a voter who cannot read, as to the contents of his ballot, or fraudulently changing a

ballot—penitentiary from one to three years. 10. Fraudulently putting a ballot into the box after the polls are opened—penitentiary from one to three years, and if a judge of the election from one to five years. 11. Any judge or clerk of an election knowingly violating his duty as prescribed by law—penitentiary from one to five years. 12. Betting on elections—fine between five and five hundred dollars.

Offences connected with banking. 1. Any officer of an incorporated bank refusing to indorse, on notes presented for redemption and not redeemed, the date and fact of presentation—fine from five to fifty dollars for each note. 2. Any officer of an incorporated bank knowingly making a false statement to bank commissioners—penitentiary from one to ten years. 3. Acting as an officer of a bank not incorporated by law—fine of one thousand dollars. To constitute a bank, there must be a company or association which lends money or some evidence of debt, and issues paper designed to circulate as money, or causes the same to be done; and any person is declared to be an officer who in any way intermeddles with the concerns of such bank for its benefit. 4. Acting as an officer or agent of an incorporated bank, which issues notes less than five dollars, or notes payable elsewhere, or at a future day, or in any thing else than gold and silver, or dealing in such paper as a broker—fine of one hundred dollars. 5. Acting as an officer or agent of a municipal corporation which issues paper intended to circulate as money—fine of fifty dollars. 6. Passing, or paying out paper designed to circulate as money and not authorized by law—fine of four times the amount. 7. Acting as an agent of any bank incorporated out of this state, or of any individual or association out of this state engaged in banking, with a view to give circulation to their paper—fine of one thousand dollars. 8. Any receiving or disbursing officer of the state receiving or paying out unauthorized paper—fine of one hundred dollars.

Neglect of official duty. Under this head might be enumerated a great number of fines, imposed upon officers for the neglect of the duties assigned them by law. But suffice it to say, there is scarcely a duty imposed upon a citizen, connected with the municipal concerns of the state, the neglect or refusal to perform which, does not involve a penalty or forfeiture.

Offences against the public health. (a) These are commonly called *nuisances*, and are as follows. 1. Putting the carcass of any dead animal into any river, creek, pond, road, alley, lot, field, meadow, or common, or permitting the same to remain there—fine from one to fifteen dollars. 2. Putting the same into a well, stream, or brook of running water, used for domestic purposes—fine from two to forty dollars. 3. Knowingly selling unwhole-

some provisions—fine within fifty dollars. 4. Creating or keeping up ponds of stagnant water—fine within five hundred dollars, and abatement of the nuisance. 5. Permitting a slaughter or meat house to remain unclean, between April and October—fine between five and fifty dollars. 6. Permitting a factory for making soap, candles, oil, glue, or varnish; or a house for putting up pork, lard, or sausages, to remain unclean at any time—fine between ten and forty dollars. It is perhaps a matter of regret that our provisions against nuisances do not extend further. A variety of other nuisances will suggest themselves, equally offensive with those above specified, which are punishable at common law, but cannot be punished here, for want of express provision.

Offences against public morals. (a) Under this head are included the following.

Selling intoxicating liquor to Indians; fine between twenty-five and one hundred dollars, and forfeiture of license. But this does not include a tavern-keeper, who sells not more than one gill to an Indian who is travelling.

Lotteries. 1. Being concerned in getting up any lottery or scheme of chance—fine within five hundred dollars. 2. Selling lottery tickets or having any agency therein—fine within two hundred dollars.

Gaming. 1. Playing at any game, except for athletic exercise, or betting on either side, in any ordinary, tavern, race-field, or place connected therewith; or playing at any game whatever in any place for gain; or betting upon any matter whatsoever—fine within one hundred dollars. 2. Keeping any gaming table, device, or machine, or suffering one to be kept, for the sake of gain—fine between fifty and two hundred dollars. 3. The keeper of any tavern, ordinary, or house of public resort, permitting gaming of any kind in or about the premises—fine between fifty and one hundred dollars, and forfeiture of license. 4. All gaming contracts are declared void; money lost may be recovered at any time within six months, by the loser or any other person on his behalf; and a bill of discovery may be filed, or any person present or concerned, may be made a witness to prove the fact.

Offences against religion. 1. Sporting, rioting, quarreling, hunting, fishing, or laboring on Sunday—fine from one to five dollars. But this is declared not to include persons under fourteen; nor persons who conscientiously observe the seventh day; nor families moving or emigrating; nor ferry-men, water-men, or toll-receivers; nor works of necessity or charity. 2. Selling spirituous liquors on Sunday, except to travellers—fine within five dollars. 3. Disturbing any religious meeting at any time—fine within twenty dollars. 4. Profanely cursing or damning; or swearing by the name of God, Jesus Christ, or the Holy

(a) See 2 Swift's Dig. book 5, chap. 8; 4 Black. chap. 4.

Ghost—fine within one dollar. But this is declared not to include persons under fourteen. 5. Selling liquor within two miles of a religious meeting—fine within fifty dollars. But this does not include those whose usual places of selling liquor is there.

Miscellaneous. 1. Playing bullets, or running horses, or shooting at a target, along or across the street of any town or village, or running a horse race on any public road in common use—fine within five dollars. 2. A tavern keeper or retailer of liquors, keeping or permitting a ball or ninepin alley—fine from ten to one hundred dollars. 3. Exhibiting any public show without license—fine within one hundred dollars. 4. Exhibiting for gain any puppet show, wire dancing, tumbling, juggling, or slight of hand—fine of ten dollars. 5. Being concerned in bull or bear baiting—fine within five hundred dollars. 6. Being concerned in cock-fighting—fine within twenty dollars.

Offences against the public peace. (a) These are as follows:

Riots. (b) 1. Three or more persons assembling together, with intent to do an unlawful act, with force and violence, against the person or property of another, or against the peace; or, when lawfully assembled, agreeing to do such unlawful act, and making motion or preparation thereto—fine within two hundred dollars, and imprisonment within ten days. 2. Forcibly obstructing conservators of the peace in quelling a riot; or continuing together, after proclamation to disperse; or actually committing an unlawful act as aforesaid—fine within five hundred dollars, and imprisonment within thirty days, and security for good behavior. 3. It is also declared that if rioters be killed, wounded, or maimed, in the exercise of necessary and proper means to disperse them, it shall be no crime.

Affrays. Two persons by agreement wilfully fighting or boxing at fisticuffs—fine within fifty dollars, and imprisonment within ten days.

Exciting disturbance. Exciting disturbance or contention, at a tavern, court, election or other meeting of citizens—fine within five dollars, or imprisonment within six hours.

Digging up dead bodies. Being concerned in digging up or carrying away any dead human body from any cemetery or burial ground, or attempting so to do—fine within one thousand dollars, or imprisonment within thirty days, or both.

Offences against public property. (c) These are as follows:

Infractions of the canal regulations. The highest offence of this kind, is that of wilfully and maliciously breaking or destroying any lock, bank, dam, aqueduct, or culvert of any canal belonging to the state; the punishment of which is imprisonment in

(a) 2 Swift's Dig. b. 5, chap. 6; 4 Black. chap. 11.

(b) As to the power to suppress riots, see 1 West. Law Jour. 418.

(c) See 2 Swift's Dig. b. 5. chap 5.

the penitentiary from three to seven years, and liability for damages : and there are numerous minor offences under this head ; but not being of general interest, I shall not enumerate them.

Destruction of public buildings, bridges, and other property. These offences will be described in connection with similar injuries to private property.

Obstruction of navigable rivers.(a) We have seen that all the navigable rivers within the state are declared to be public highways ; but there is no provision against obstructing their navigation, with the single exception of the Muskingum ; where the penalty is a fine within fifty dollars, or imprisonment within ten days, or both. As we have no general provision against nuisances, under which the obstruction of roads or rivers can be punished, as at common law, would it not be well to provide specially against this particular kind of nuisance, with reference to all public roads and rivers?

§ 194. *Crimes affecting private persons.* The personal rights or immunities of individuals, expressed in general terms, include life, liberty, health, reputation and happiness. These rights, as we have seen, are declared to be natural, inherent, and unalienable. Accordingly, the acts which tend directly to endanger or destroy them, are generally prohibited under severe penalties.

Homicide. (b) According to Blackstone, "homicide, or the killing of any human creature, is of three kinds, *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all ; the second very little ; but the third is the highest crime against the law of nature, that man is capable of committing." But I shall confine my remarks to felonious or criminal homicide, that

(a) See 4 Black. 167.

(b) *Indictment for murder in the first degree.* That heretofore, to wit on ——— at ———, to wit at the county aforesaid, one ———, with force and arms, in and upon one ———, purposely and of deliberate and premeditated malice, did make an assault ; and the said ———, did then and there, with a certain knife, held in his right hand, purposely, and of deliberate and premeditated malice, strike and thrust the said ———, in and upon the left side of the body, and between the ribs of him, the said ——— ; thereby giving to the said ——— then and there, with the knife aforesaid, upon his body aforesaid, one mortal wound, of the breadth of three inches, and of the depth of six inches ; of which said mortal wound the said ———, from the said [date of the wound], until [date of the death], at the county aforesaid, did suffer and languish, and languishing, did live ; on which said [date of the death], in the county aforesaid, the said ———, of the said mortal wound did die ; and so the said ———, in manner and form aforesaid, did purposely and of deliberate and premeditated malice, kill and murder the said ———.

Indictment for murder in the second degree. This form is the same as the preceding, except that the words, "purposely and maliciously, but without deliberation and premeditation," are to be used throughout in place of the words, "purposely, and of deliberate and premeditated malice."

Indictment for manslaughter. This form is the same as the first, except that the words, "unlawfully and feloniously," are to be used instead of the words, "purposely and of deliberate and premeditated malice ;" and the word "murder" is to be omitted, leaving only the word "kill."

alone being punishable; and I shall say nothing of suicide, because, however wrong in the sight of heaven, our law does not attempt to punish it even by disgrace. By the law of England, felonious or criminal homicide is of two kinds, *murder* and *manslaughter*, which are thus defined by Blackstone.—“Murder is when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king’s peace, with malice aforethought, either express or implied.”—“Manslaughter is the unlawful killing of another without malice either express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act.” (a) But in this state there are four kinds of criminal homicide, namely, *murder in the first degree*, *murder in the second degree*, *manslaughter*, and the *destruction of a child before birth*, which are defined by our statute as follows.

Murder in the first degree is where one kills another purposely, and of deliberate and premeditated malice, or in the perpetration of, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done. The punishment is death, which is here reserved for this crime only.

Murder in the second degree is where one kills another purposely and maliciously, but without deliberation and premeditation. The punishment is imprisonment in the penitentiary for life.

Manslaughter is where one unlawfully kills another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act. The punishment is imprisonment in the penitentiary from one to ten years.

Destroying a child before birth, is where a physician or other person intentionally causes the death of an unborn but living child, by administering any drug or substance, or employing any instrument or other means whatsoever, unless the same be necessary to preserve the life of the mother, or be advised by two other physicians. The punishment is imprisonment in the penitentiary from one to seven years.

The grand distinction between murder and manslaughter is, that in murder the killing is always with *malice*, while in manslaughter it is without malice. The precise legal idea of malice, as an ingredient in crime, can hardly be expressed by a brief definition. It does not mean simply the intention to kill, for I may intentionally kill another in self-defence. Nor does it mean anger, in the common acceptation of that term; for anger is precisely that “*sudden heat*,” which determines the killing not to be murder. But it means that dark, sullen, malevolent disposition of the mind, which, in the prosecution of its mischievous purposes is equally reckless of divine and human law. The description of malice given by Blackstone is as follows. (b) “Malice pre-

(a) 4 Black. 177, 195, 191.

(b) 4 Black. 198, 199, 200.

pense, *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart.”—“Express malice is when one with a sedate, deliberate mind and formed design doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.”—“Also in many cases where no malice is expressed, the law will imply it; as where a man wilfully poisons another, in such a deliberate act, the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice.”

The distinction between the two degrees of murder, though apparently well founded in reason, and certainly commendable for its humanity, does not exist under the laws of England, nor of the United States, nor of many of the states. It consists in this. (a) In both the killing is done purposely and maliciously; but in one there is *deliberation* and *premeditation*, while in the other there is not. As to the length of time necessary to constitute deliberation or premeditation, no definite rule can be laid down. It varies with persons and circumstances. In some minds a minute would be as effectual as a month. The questions for the jury are—Had the slayer space and opportunity for reflection? Did he think over what he was about to do? Did he coolly form a settled purpose? Was his mind sedately and considerably made up to take life? If these questions be answered in the affirmative, the verdict must be murder in the first degree. If not, and yet the killing were done purposely and maliciously, it must be murder in the second degree. But there are five cases in which our statute precludes the question of deliberation, namely, where the killing takes place in the perpetration of rape, arson, robbery, burglary, or poisoning. In these cases, from their peculiar enormity, the law presumes both malice and premeditation.

If the killing be not malicious, and yet be unlawful, it is manslaughter; of which there are two kinds: the one *voluntary*, resulting from a sudden quarrel; the other *involuntary*, resulting from some unlawful act. In Pennsylvania and Virginia, (b) a distinction is made in the punishment of these two offences, and involuntary manslaughter is regarded as a misdemeanor only, and not a felony. Our statute makes no such distinction, although it would seem to be as well founded as in the two degrees of murder. To constitute voluntary manslaughter, there must be an

(a) *Republica v. Mulatto Bob*, 4 Dall. 149; *Pennsylvania v. Lewis*, Addison, 279; *Shoemaker v. the State*, 12 Ohio, 43; *Ohio v. Turner*, Wright's Rep. 75; *Ohio v. Williams*, Wright's Rep. 199; *Ohio v. Gardiner*, Wright's Rep. 392; *Ohio v. Thompson*, Wright's Rep. 617.

(b) 7 Serg. and Rawle, 423; 5 Tucker's Black. 192.

intention to kill at the moment of killing ; but this intention must be the result of sudden heat, and without the least malice or premeditation. It is often very difficult to distinguish between voluntary manslaughter and murder in the second degree, since the question turns upon the presence or absence of malice at the moment of killing ; and this must be determined by circumstances developing themselves on the instant. The most important of these are the kind and degree of provocation. If the provocation be such as greatly to excite the passions, the offence will be manslaughter ; if not, malice will be inferred, and the case will be murder in the second degree. If the killing be involuntary, that is, if there be no intention to kill at the moment of killing, but yet the slayer is in the commission of some unlawful act, the case is one of involuntary manslaughter. And it is not every unlawful act which makes an unintentional killing manslaughter. The mere withholding from another any legal right is an unlawful act, but this cannot be what the law intends. Nor would an ordinary trespass be such an act. If, for example, in getting over another's wall to cross his field, I should accidentally cause a stone to fall and kill some one, this would not be manslaughter. But while the books leave the question as to the exact nature of the unlawful act in doubt, reason would seem to require that it should either be a misdemeanor or an aggravated trespass ; because it is the unlawfulness of this precedent act, and not the killing of itself, which constitutes the crime. And it may happen that a sudden quarrel is the unlawful act in question. In this case the inquiry would seem to be, who was first in fault for bringing on the quarrel ? If the person slain commenced the quarrel, and the killing were unintentional, the slayer would be innocent ; for as to him the quarrel was not an unlawful act.

It is a familiar maxim of criminal law ; that every man is presumed to be innocent, until proved to be guilty. Yet in cases of homicide, when the fact of killing is once proved, the legal presumption is that of murder ; and it lies upon the accused to prove any circumstances of justification or palliation. The doctrine is thus stated by Blackstone. (a) " We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless when *justified* by the command or permission of the law ; *excused* on the account of accident or self-preservation ; or *alleviated* into manslaughter, by being either the involuntary consequence of some act not strictly lawful, or, if voluntary, occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent on the prisoner to make out to the satisfaction of the court and jury." But where a distinction exists between the two degrees of murder, this rule is

(a) 4 Black. 201.

so far modified, that the presumption is only that of murder in the second degree. (a) To make out murder in the first degree, the burthen of proof falls upon the state. To make out manslaughter or entire innocence, the burthen of proof falls upon the accused.

Upon the maxim, that the greater always includes the less, it has become a rule in cases of homicide, that under an indictment for murder in the first degree, the prisoner may be convicted either of murder in the second degree or manslaughter. (b) This rule has been so long acquiesced in, that it may now be too late to call it in question. But it seems to be in direct opposition to that constitutional guarantee which secures the accused the privilege "of demanding the nature and cause of the accusation against him, and having a copy thereof." The meaning of these words appears to be that the accused shall not be tried for any offence not charged in the indictment, be it greater or less; the object of an indictment being to notify him precisely what charge he is called upon to meet.

The most common defence set up in cases of homicide is that of *self-defence*, of which I have before spoken. On this subject the authorities do not seem to be entirely in harmony. Blackstone, (c) quoting from Hale, says that "the party assaulted must flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit." But Forster in his *Crown Law*, (d) states the doctrine thus.—"In the case of justifiable self-defence, the injured party may repel force by force, in defence of his person, habitation, or property, against one who manifestly intendeth or endeavoreth, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger; and if in a conflict between them he happeneth to kill, such killing is justifiable." I understand by this that if I am attacked it is not necessary that my life be endangered, before I can resort to self-defence. It is enough if there be danger of great harm. Nor is it necessary that the danger should actually exist. It is enough if there be reasonable ground for apprehension. Chief Justice Parker, on the trial of *Selfridge*, stated the doctrine thus. (e) "When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy life, or commit a felony upon the person, the killing of the assailant will be excusable homicide, although it should afterwards appear

(a) Wright's Rep. 28.

(b) 2 Chitty C. L. 739; 2 Hale P. C. 302; 7 Serg. and Rawle, 423.

(c) 4 Black. 185.

(d) Forster C. L. 273.

(e) *Selfridge's Trial* 160: 1 West. Law Jour. 23.

that no felony was intended." And this is the good sense of the matter. The party assailed must judge from the circumstances of the moment, and act upon the hasty conclusion thus formed. The cowardly doctrine, therefore, of retreating as far as possible before resisting, would seem to have no more foundation in law, than it has in the common feelings or practice of mankind. And although it is clear that no words, however provoking, will justify the taking of life, it may well be questioned whether, in this country, any man is bound to submit quietly to a blow, though intended only to disgrace him. Such I understand to be the doctrine held in the celebrated cases of Selfridge and Goodwin. It was thus stated by the late Mr. Dexter in his defence of the first of these cases. "I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I would practice moderation and forbearance to avoid so terrible a calamity; yet should I ever be driven to that impassable point where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor."

Rape upon daughter or sister. (a) Having carnal knowledge of one's daughter or sister, forcibly and against her will—penitentiary for life. This offence has all the turpitude of rape and incest combined.

Rape upon any other woman. Having carnal knowledge of any other female than one's daughter or sister, forcibly and against her will; or a male of seventeen or more having carnal knowledge of a female under ten, with her consent—penitentiary from three to twenty years. This definition does not exclude the wife, but the law implies such exclusion. For a man cannot be punished for a rape upon his own wife, though he may for aiding and abetting another to ravish his wife. But a strumpet or paramour may be the subject of rape as much as a virtuous female.

Carnal knowledge of an insane woman. A male over seventeen having carnal knowledge of any insane woman, not his wife, knowing her to be insane—penitentiary from three to ten years. This offence might properly be called a rape, since an insane person is incapable of consenting.

(a) *Indictment.* That heretofore to wit, on ———, at ———, to wit at the county aforesaid, one ———, with force and arms, in and upon ———, a female did make an assault; and her the said ——— did then and there feloniously ravish and carnally know, by force and against her will; she the said ——— then and there being the daughter of him the said ——— as he the said ——— then and there well knew.

If the rape be upon any other woman not insane, the form is the same, except that the allegation of being daughter or sister is omitted; and if the female be under ten, and the male seventeen or more, these facts are alleged, and the words "by force and against her will," may be omitted. If the female be insane, this and the scienter must be alleged, and also, probably that she is not the wife of the accused; and the force may be omitted as before.

Bigamy. Marrying a second time, while a former husband or wife is living, unless such husband or wife shall have been continually and wilfully absent and unheard from, for five years next preceding—penitentiary from one to seven years.

Incest. Sexual intercourse between parent and child, or brother and sister, the parties knowing their relationship—penitentiary from three to ten years. Our statute includes step-parent and step-child; and it limits the criminality as between brother and sister, to above sixteen years of age. But there are two singular omissions, probably accidental. The intercourse between mother and son is not provided for, while that of a step-mother and step-son is; and the language is not such as to make the daughter or step-daughter punishable. Nothing is said as to half brother and sister.

Adultery. (a) Adultery usually signifies criminal conversation between two married persons, or a married and an unmarried person, which introduces, or tends to introduce a spurious offspring into the family. To constitute adultery, there must be carnal connexion. In England the punishment of adultery is left to the spiritual courts. In this country it is generally punished by fine and imprisonment. In this state a single act is a good cause of divorce; and if a wife leave her husband and dwell with her adulterer, it bars her dower, unless forgiven by the husband. In addition to which, we have the following penal provisions. 1. A married woman deserting her husband, and living and cohabiting with another man in a state of adultery—imprisonment within thirty days. 2. A married man deserting his wife, and living and cohabiting with another woman, in a state of adultery; or, living with his wife, but keeping another woman and notoriously cohabiting with her in a state of adultery; or, an unmarried man living and cohabiting with a married woman, in a state of adultery—fine within two hundred dollars, and imprisonment within thirty days. But the language of the statute is such as to leave it doubtful whether both parties are punishable or not. And it will be observed that an unmarried woman is not punishable for intercourse with a married man, though an unmarried man is punishable for intercourse with a married woman. I can see no reason for this discrimination, and presume it to be accidental. It will also be observed that a *single act* is not punishable. There must be a *living and cohabiting in a state of adultery*, to constitute the offence. This cannot be oversight;

(a) *Indictment.* That heretofore to wit on ——— at ———, to wit at the county aforesaid, one ———, being then and there a married man, did then and there desert ——— his lawful wife, and from the day aforesaid until the ——— did there live and cohabit with another woman, to wit one ———, in a state of adultery, by having carnal knowledge of the body of her the said ———, at divers times between the days aforementioned.

though I see no good reason for such an indirect toleration of single acts.

Fornication. Unmarried persons living and cohabiting together in a state of fornication—fine within one hundred dollars, and imprisonment within ten days, for both parties. Here again a *single act* does not constitute the offence; but the language is explicit that both parties are punishable. Thus, while an unmarried woman is punishable for intercourse with an unmarried man, she is not punishable for intercourse with a married man. Can there be a solid reason for this discrimination? If so, it does not occur to me.

Assault with criminal intent. (a) Assaulting another with intent to commit murder, rape, or robbery—penitentiary from three to seven years. Here two things are to be considered, the *assault*, and the *intent*. An assault is any attempt, with force or violence, to do a corporal injury to another, coupled with a present ability to carry such attempt into effect. Hence mere words never amount to an assault, though they serve to explain the intent of the act constituting the assault. And it follows, that an assault is complete without effecting the corporal injury attempted. As to the intent, it must be to commit a *murder*, *rape*, or *robbery*; and it must be ascertained from the declarations of the party, or the circumstances of the assault. The rule is that persons are presumed to intend the natural and probable consequence of their acts. Hence if the weapon be such, and so used, as probably to produce death, the inference is that death was intended. With respect to the intent to commit murder, the test is, that the circumstances must be such, as, if death had taken place, would have made it a case of murder in the first or second degree. If it would have been manslaughter, the offence cannot be greater than assault and battery. As to rape and robbery, the intent is much more easily deducible from the circumstances of the assault.

Mayhem. According to Blackstone mayhem is “the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary.” (b) But our statute makes it a very different thing, namely:—Unlawfully and purposely cutting, or slitting the nose, ear, lip, tongue, or other member, or putting out the

(a) *Indictment.* That heretofore to wit, on —, at —, to wit at the county aforesaid, one — with force and arms did make an assault upon one — with a dangerous weapon, to wit, with a drawn sword, which he the said — in his right hand then and there held, with intent purposely and of deliberate and premeditated malice to kill and murder him the said — with the drawn sword aforesaid.

Under an indictment for this offence there may be a conviction of assault and battery merely. *Stewart v. State*, 5 Ohio, 241. And where the intent was to commit a rape, it is sufficient so to allege, without specifying the age of the female, or whether or not she was a daughter or sister of the accused. *Bowles v. State*, 7 Ohio, part 2, 243.

(b) 4 Black. Com. 205.

eye of another, with intent to murder, kill, maim or disfigure—penitentiary from one to twenty years. The word “kill” is here used in connexion with murder; but if I am right in the preceding conjecture, it has no meaning. If you can infer an intent to take life in this way, it must be from such circumstances as would have made the killing murder in the first or second degree, had the purpose been effected. As to the intent to maim or disfigure, it cannot admit of doubt.

Shooting or stabbing. Maliciously shooting, stabbing, or shooting at another, with intent to kill, wound, or maim—penitentiary from one to twenty years. With respect to *shooting*, it is immaterial whether the shot takes effect or not, if the party was shot at. But it is essential that the gun or pistol should have been loaded with something calculated to kill, wound, or maim. With respect to *stabbing*, it must be done with some pointed weapon which actually penetrates the body. The intent to wound or maim would seem to be a necessary inference from the single fact of shooting or stabbing. The intent to kill may require the addition of other circumstances; and they must be such, that had death ensued, the killing would have been murder and not manslaughter; for though the word murder is not used, yet as the act must be *malicious*, it amounts to the same thing; since a malicious killing is murder. It will be observed that whenever the intent is to kill, the shooting or stabbing would be included in the offence before described, of an assault with intent to commit murder.

Duelling. Fighting a duel; being second; giving, accepting, or knowingly bearing a challenge; or advising, prompting, or encouraging a duel, though none be fought—penitentiary from one to ten years, and perpetual disqualification for office. If death ensue, the offence is murder; and though the statute seems to suppose that it may sometimes be in the second degree, it would seem as if the manifest deliberation of a duel, must always make death murder in the first degree. It will be observed that the language is so comprehensive as to include all persons in any way concerned in a duel.

Poisoning with intent to kill. Administering poison to another, with intent to destroy life, or preparing poison with that intent, so that it be taken—penitentiary from three to fifteen years. Here the intent to kill can hardly admit of doubt, when the facts are proved.

Kidnapping. Carrying or decoying out of this state, by force or fraud, without lawful authority, any white or colored person, or attempting so to do, or aiding therein—penitentiary from three to seven years.(a)

(a) But according to the case of *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 539, this provision is unconstitutional with respect to fugitive slaves, who may therefore be kidnapped with impunity, so far as this provision is concerned.

Assault and battery. Unlawfully assaulting or threatening another in a menacing manner, or unlawfully striking or wounding another—fine within one hundred and fifty dollars, or imprisonment within ten days, or both; besides a civil liability to the party injured. If, however, the offender, not at his own instance, but on the complaint of the party injured, will plead guilty before a justice, he may be fined from five to one hundred dollars, and have the proceeding end there. As to what constitutes an assault, we have already seen that it must be something more than mere words; there must be some menacing motion, which, if carried into effect, would complete the battery or beating.

Sending threatening letters. Knowingly sending or delivering any letter or writing to another, with or without any name, or with a fictitious name, containing wilful and malicious threats of injury, with intent to extort money or other value from such person—fine from fifty to five hundred dollars, or imprisonment within ten days, or both.

Malpractice of physicians. 1. Any physician or other person wilfully administering to a pregnant woman any medicine, drug, or other thing, or using any instrument, with intent to procure a miscarriage, unless the same shall be necessary to preserve her life, or be advised by two physicians—fine within five hundred dollars, or imprisonment within one year, or both. We have already seen that if a living child be thus destroyed before birth, it is a penitentiary offence. 2. Prescribing, while in a state of intoxication, any poison, drug, or medicine to another, which shall endanger life—fine within one hundred dollars. 3. Prescribing any drug or medicine to another, endangering life, without first declaring its true nature and composition, if inquired—fine within one hundred dollars. This last is aimed against quackery; but it is so framed as to make conviction very difficult.

Libel. (a) Writing, printing, or publishing any false or malicious libel of or concerning another, or causing or procuring the same to be done—fine within five hundred dollars, and civil liability to the party injured. (b) We have already considered the constitutional provisions relating to liberty of speech and of the press. The mere uttering of slanderous words, though it may render the party liable to a civil action for damages, does not

(a) *Indictment.* That heretofore to wit on ———, at ———, to wit at the county aforesaid, one ———, maliciously intending to injure, vilify and defame the character of one ———, and to bring him into disgrace, contempt, and infamy, did write, print, and publish, and cause to be written, printed and published in a certain newspaper called the ———, a certain false, scandalous, and malicious libel of and concerning the said ———, which said false, scandalous, and malicious libel is of the purport and effect following, to wit; [here set forth the libel with the proper innuendoes]; to the great damage, infamy and scandal of him the said ———.

(b) See 4 Black. 150; 2 Swift Dig. 340; Holt's Law of Libel; and for what constitutes a libel in this state, *Watson v. Trask*, 6 Ohio, 531; *Tappan v. Wilson*, 7 Ohio, part 1, 190.

constitute a libel, and cannot be prosecuted criminally. There must be a writing, printing, or publishing of the slander; and it must be done maliciously, that is, with intent to injure the party libelled: if false, the malicious intent will be inferred of course; if true, it may or may not be malicious, according to the circumstances. If it concern public men or measures, the constitution makes the truth a justification. As to publication, it is held that the communicating of the libel to a single individual is a publication; and that pictures as well as writings may be libellous, if made public.

§ 195. *Crimes affecting private property.* This division includes a variety of offences having direct reference to the property of individuals or companies; though for convenience I have included some injuries to public property. In those which relate to buildings and habitations, the ultimate purpose may be to commit a personal injury; but I have not thought it worth while to divide these into a distinct class.

Larceny and other stealing. (a) The usual definition of larceny is, "the felonious taking and carrying away of the personal goods of another." (b) *First*, there must be a *felonious taking*, that is, a taking with intent to steal, which intent must exist at the very moment of the taking. *Secondly*, there must be a *felonious carrying away*; but a mere removal of articles from their place, for the purpose of carrying them away, is held sufficient. *Thirdly*, the thing stolen must be *personally* belonging to another; for realty, being immovable, cannot be stolen. Our statute enumerates the following offences under this head:

Grand larceny. 1. Stealing any money or other personal goods

(a) *Indictment.* That heretofore to wit on ———, at ———, to wit at the county aforesaid, one ——— did feloniously steal, take, and carry away one gold watch of the value of ——— dollars, of the goods and chattels of one ———, and in his possession then and there being found.

If the indictment be for stealing written documents, they need not be set forth literally, but may be described generally; as, "one promissory note given by ——— to ——— for the payment of ——— dollars, and of the value of ——— dollars," and the scienter must be alleged. *Gatewood v. State*, 4 Ohio, 386; *Rich v. State*, 8 Ohio, 111. If the indictment be for horse stealing, it would seem that no value need be stated, but this is doubtful. The kind of horse must be specifically stated as in the statute; and it has been held that a charge of stealing a "grey horse" cannot be sustained by proof of stealing a "grey gelding." *Hooker v. State*, 4 Ohio, 348. If the indictment be for knowingly receiving or buying stolen goods, the old practice was to set forth the larceny as above, and then say—"that one ——— did then and there receive and buy the said goods and chattels so as aforesaid stolen, to wit, &c. he the said ——— then and there well knowing the same to have been stolen." And a similar practice prevailed, when the indictment was for harboring or concealing the thief. But now the practice is to omit the specification of the larceny, and say—"did buy and receive one [describe the property] of the value of ——— dollars, of the goods and chattels of one ——— then lately before stolen; he the said ——— then and there well knowing the same to have been stolen." And it has been held that the confessions of the thief made in presence of the accused, cannot be received as proof of the theft. *Morrison v. State*, 5 Ohio, 438.

(b) 2 Swift's Dig. 309; 4 Black. 229.

or chattels belonging to another, of the value of thirty-five dollars and upwards—penitentiary from one to seven years. 2. By another provision the same punishment is prescribed for stealing or maliciously destroying any written security for money or other evidence of value, of the same amount, knowing them to be such. 3. Horse stealing is specially provided for, without reference to the value of the animal, and the time of imprisonment is from three to fifteen years. 4. The same punishments are prescribed for knowingly receiving, buying, or concealing, any of the above stolen articles, or harboring the thief. This is in accordance with the common saying, that the partaker is as bad as the thief. But no provision is made for remunerating the owner, and making this a part of the sentence. This, therefore, must be the subject of a separate proceeding. The reason why horse stealing, or participating therein, is punished more severely than other theft, and without regard to value, perhaps is, that in a grazing country like ours, horses are more exposed than other property. The statute is very minute in enumerating the various kinds of money securities and of horses, which may be the subject of larceny. I have already doubted the expediency of such minute specifications. In the present case, for example, if there be one written security, or one description of horse not specified, it may be stolen with impunity; and the danger is that no legislative foresight can enumerate all. Hence a general and comprehensive description, such as I have chosen, for convenience and brevity, would be preferable in principle.

Petit larceny. Stealing any of the above mentioned articles, except horses, when the value is less than thirty-five dollars, or knowingly concealing the same—fine within two hundred dollars, or imprisonment within thirty days, or both. Probably from inadvertence, nothing is said about buying them or concealing the thief, as in grand larceny; but here provision is made for double compensation to the owner, which was entirely omitted with respect to grand larceny. Our criminal law abounds with such inadvertencies. You will observe that the distinction between grand and petit larceny is made to depend upon the value stolen; and thirty-five dollars is made the turning point. Some have doubted the expediency of this. That there should be a distinction between stealing a large amount and a small one, though there may be the same inward depravity in both cases, is undoubtedly expedient; for the severity of punishment should be proportioned to the necessity of prevention, which is itself proportioned to the temptation to steal; and the temptation increases with the value of the article. But admitting this, ought not the punishment to vary regularly with the amount, instead of making a single dividing line? Undoubtedly a law might be framed, apportioning the punishment uniformly according to the value, which the present law does not. A cent above the dividing line sends the convict to the penitentiary, and the largest amount does no more. A cent

below saves him from the penitentiary, but punishes him no more than the smallest value. But this is matter of speculation. There is no doubt, however, that our law of larceny will admit of improvement in the several points before indicated; and would it not be well, so to generalize the definition of the subject-matter, as to include in one comprehensive expression, every species of moveable value, which can be feloniously taken? This question is at least worthy of consideration.

Embezzlement. Any clerk or servant of an individual or partnership, except apprentices and persons under eighteen years; or any officer, agent, clerk, or servant of a corporation; or any carrier embezzling, or converting to his own use, or fraudulently taking or secreting with such intent, any money, goods, rights in action, or other valuable security or effects, which shall have come into his possession or care by virtue of his employment; or buying or receiving such things knowing them to have been so embezzled or taken—same punishment as for larceny, depending upon the value. In fact the only difference between larceny and embezzlement as thus defined, is that there is no felonious taking. Why apprentices and persons under eighteen should be exempted, if they be old enough to distinguish between right and wrong, is not very apparent.

Robbery. (a) Taking forcibly from the person of another, by violence or putting in fear, any money or personal property of any value whatever, with intent to rob or steal—penitentiary from three to fifteen years. This, it will be seen, is only a more aggravated species of larceny. In addition to the felonious taking of property, there is violence or putting in fear. On account of this aggravation, the amount taken is held immaterial, and the smallest value thus taken completes the offence. According to the definition, the taking must be from the person; but it is held sufficient, if the taking be in the presence of the owner. The definition here includes money and *personal property*. That of larceny includes money and *personal goods and chattels*. Hence it was there necessary to make a special provision for money securities, which is not necessary here, because they are personal property, though not strictly goods or chattels. This shows the policy of using general and comprehensive terms.

Forgery and counterfeiting. (b) By the English definition,

(a) *Indictment.* That heretofore, to wit, on —, at —, to wit, at the county aforesaid, one — with force and arms did feloniously make an assault upon one —, and did then and there put the said — in fear and danger of his life; and did then and there feloniously, and by violence and putting in fear, steal, rob, take, and carry away from the person, and against the will of the said — one gold watch of the value of one hundred dollars, of the goods and chattels of the said —.

As our statute makes the value immaterial, in case of robbery, it may be doubted whether value need be alleged; but as the thing taken must be of some value, it would not be safe to omit the allegation.

(b) *Indictment.* That heretofore to wit, on —, at —, to wit at the county

forgery consists "in fraudulently making or altering any writing, to the prejudice of another's right." This is clear and comprehensive. Counterfeiting, in England, is confined to the current coin of the realm, and is treated as a species of treason. But our statutory provisions are very minute in specifying the subjects and the manner, both of forgery and counterfeiting. In describing them, however, I shall generalize as much as possible.

1. Falsely making, altering, forging, or counterfeiting, any writing of whatever kind, upon which any claim or evidence of claim to any species of property, money, or value, is founded; or knowingly uttering or publishing the same, as true and genuine; or causing the same to be done; with intent in either case to injure or defraud another—penitentiary from three to twenty years. The statute enumerates a long list of writings which may be thus forged or counterfeited, but the above description probably includes them all. You will observe that four words are employed to designate the manner of committing the offence; but the first two probably include all; for it is difficult to conceive of any other species of forgery or counterfeiting, than that of *falsely making* the instrument in question, or *falsely altering* it, when already made; but the mere making or altering the writing does not complete the offence. It must be done *with intent to defraud*; otherwise, taking the strict letter, a merely sportive use of the pen, might be converted into a crime. 2. Counterfeiting any of the coins of gold, silver, or copper current in the state; or knowingly passing or putting them off; or knowingly making or keep-

aforesaid, one — did falsely make, alter, forge and counterfeit a certain promissory note for the payment of money, purporting to be made and signed by one —, for the sum — dollars, which said false, forged and counterfeit promissory note is of the purport and effect following, to wit, [here set forth a true copy of the note]; with intent then and there to injure and defraud the said —.

If the indictment be for uttering &c., say, "did utter &c., as true and genuine, a certain &c., with intent &c., he the said — then and there well knowing the said &c., to be false, forged and counterfeit." The person whose name is forged is a competent witness to prove the forgery, without calling the subscribing witness. *Simmons v. State*, 7 Ohio, part 1, 116. The degree of resemblance between the forged and genuine instruments is not material, if it be such as might deceive persons of ordinary observation. *Hess v. State*, 5 Ohio, 1. An indictment for forgery must specifically set forth the forged instrument, and the proof must correspond to the description. *McMillen v. State*, 5 Ohio, 268; *Pickens v. State*, 6 Ohio, 274. But the indorsement on a note need not be set forth. *Hess v. State*, 5 Ohio, 1. An indictment for selling counterfeit notes need not set forth the consideration, nor that the sale was to the injury of any one. *Hess v. State*, 5 Ohio, 1. If an unincorporated association in actual existence issue bills, the passing of them is not an offence within the provisions now under consideration. *Sutton v. State*, 9 Ohio, 133. The provisions respecting coins include foreign as well as domestic coins, if they be current in the state; but the indictment for putting off counterfeit coins need not allege the fact of being current; though it is otherwise for counterfeiting. *Sutton v. State*, 9 Ohio, 133; *Smith v. State*, 8 Ohio, 294; *Fight v. State*, 7 Ohio, part 1, 180. Where the indictment states that the prisoner secretly kept instruments of counterfeiting, this is a sufficient scienter. *Sutton v. State*, 9 Ohio, 133. On the general subject, see 4 Black. Com. 83, 247; 2 Swift's Dig. 305.

ing any instrument for counterfeiting them—penitentiary from three to fifteen years. 3. Knowingly selling, exchanging, or passing any counterfeited bank note or bill, or having the same in possession with that intent, whether such note have signatures or not, or have fictitious signatures; or knowingly making, altering, or passing any note or bill purporting to be of a bank which never existed—penitentiary from three to fifteen years. 4. Gilding any silver coin or other metal, so as to give it the appearance of a gold coin, with intent to defraud; or knowingly passing such gilded coin—penitentiary from one to five years. 5. Knowingly engraving any plate or other instrument for counterfeiting or altering bank notes or bills; or causing the same to be done; or having the same in possession for that purpose—penitentiary from three to fifteen years. 6. Knowingly attempting to pass any counterfeit coin, bank note or bill—penitentiary from one to five years. It would thus appear that the purity of the currency is well protected; and yet so great is the temptation to counterfeit money, and especially bank notes, that scarcely any crime is more prevalent. Such are the provisions against forgery and counterfeiting. The two terms are very nearly, if not altogether, synonymous; and here, again, the question may be asked, why so many distinct provisions are necessary to describe these offences? Might not a single comprehensive expression be found, which would include every description of forgery and counterfeiting, both in reference to the agent, the instrument, the manner, and the matter? This would seem to be both possible and expedient.

Burglary and other house-breaking. (a) The substance of the English definition of burglary is, "breaking and entering into a mansion-house by night, with intent to commit a felony." (b) 1. There must be a breaking as well as entering, though they need not be at the same time; but the raising of a window or opening of a door, without breaking the fastenings, will be sufficient. And it will be an entering, if any part of the body be within, or even an instrument or weapon held in the hand. 2. It must be a house where some person dwells. 3. It must be in the night; and this means, not the whole interval between sunset and sunrise, but the interval between the termination of evening twilight and the commencement of morning twilight, when a man's

(a) *Indictment.* That heretofore, to wit, on —, at —, to wit at the county aforesaid, one — did, in the night season, to wit, about the hour of — in the night of said day, wilfully, maliciously, and forcibly break and enter into the dwelling house of one — there situate, with intent then and there feloniously and burglariously to steal, take, and carry away the goods and chattels of the said — in the said dwelling house then and there being.

If the intent were to commit any other offence than stealing, describe it in the language of the statute. The burglary is complete without carrying the intent into effect. But if the intended offence was actually consummated, add another count for the offence itself.

(b) See 4 Black. 223—230; 2 Swift's Dig. 300.

features cannot be clearly seen. But whether it be moonlight or not, makes no difference. 4. The intent must be to commit a felony in the house; though nothing need be done towards effecting such intent. By our statute there are four offences of this kind, which differ from the foregoing, and from each other, in several respects. 1. Maliciously and forcibly breaking and entering into any building, structure, or edifice containing persons or property, in the night season, with intent to commit any penitentiary offence—penitentiary from three to ten years. This is the substance of the definition, though much abridged. The difference between this and the English definition is, that here the offence is not confined to dwelling houses, but may be committed in almost any species of building, the enumeration being very full. 2. Maliciously entering, by day or night, any of the aforementioned buildings, and attempting to commit a rape or arson, or to kill, disfigure, maim, rob, or stab another—penitentiary from three to ten years. The points of difference between this and the preceding offence, are, that this may be committed indifferently by day or night; there is no forcible breaking, but only a malicious entry; and there must be an actual attempt, and not a mere intent, to commit the crimes specified, which do not, like the other, include all penitentiary offences. I have said, any of the afore-mentioned buildings; but in fact, there are one or two exceptions, which, there being no reason for them, I conclude are accidental. 3. Unlawfully breaking and entering, by night, into any mansion-house, shop, store, ship, boat, or other water craft, in which any person shall reside or dwell, and committing or attempting any personal violence or abuse, or being so armed with a dangerous weapon, as to indicate a violent intention—fine within three hundred dollars, and imprisonment within thirty days. This offence differs from either of the preceding, first, with respect to the buildings, which must be those where persons reside; and secondly, with respect to the intent or attempt, which is personal violence only. (a) Hence the difference in the punishment; and though the kind or degree of violence is left to inference, it must, doubtless, be less aggravated than the preceding. 4. Committing the same offence last mentioned, in the day time—fine within one hundred dollars, and imprisonment within twenty days. But here nothing is said about being armed with a dangerous weapon; the reason of the omission is not apparent. In general it will be observed that these four offences of house-breaking, all differ from a mere trespass upon the premises of another, which is the subject of civil redress only, in the intent with which the offence is committed; which is, in each of the

(a) It has been held necessary to allege in the indictment for this offence that the house broken is the residence or dwelling place of some one; and that where one enters such a house by night with the intention of committing adultery with the owner's wife, by her consent, it is an offence within this provision. *Forsythe v. State*, 6 Ohio, 19.

cases, to do some criminal act. Whereas, in a mere trespass, there is no criminal intent.

Arson and other burning. (a) The substance of the English definition of arson is. "the malicious and wilful burning of a dwelling-house or out-house belonging thereto;" and it is punished with death. But here, as in the case of burglary, we not only do not confine the offence to dwelling-houses, but we make various other alterations in the subject and manner of the crime.

1. Wilfully and maliciously burning or causing to be burned, any dwelling-house, kitchen, smoke-house, shop, barn, stable, store-house, warehouse, malt-house, stilling-house, mill or pottery, not his own; or any other building not his own of the value of fifty dollars, or containing property of that value; or any ship, boat, water-craft, or bridge of that value; or any public building whatever—penitentiary from one to twenty years. Thus it will be seen that we have extended the crime of arson, with regard to the buildings which may be the subject of it, in the same manner as burglary. Considering the nature of the offence, the punishment is remarkably lenient. There is no offence short of murder, which indicates greater depravity of heart than this. It has not even the poor excuse of a desire of gain. The mischief is altogether gratuitous and malicious, and in a city may be immense. Therefore even when life is not endangered, the punishment ought to be exemplary. 2. Attempting to commit arson, by setting fire to any of the foregoing structures, with intent to destroy them—penitentiary from one to seven years. 3. Wilfully and maliciously setting fire to, burning, or causing to be burned, any hay, fodder, or grain, in stacks, or any corn crib, fence, boards, timber, rails or tan-bark, belonging to another—fine from ten to five hundred dollars, or imprisonment within thirty days, or both, and liability in double damages. The enumeration is much more particular than I have stated; but though designed to include every thing, it omits wood, and many other things of a similar character, which equally require this kind of protection. 4. Wilfully and maliciously setting fire to any woods, prairies, or other grounds belonging to another; or causing the same to be done; or intentionally suffering fire to pass from one's own ground to another's—fine within fifty dollars, and liability in single damages. Such are the provisions against the malicious destruction of life or property by burning. But why might there not be one general provision, punishing the malicious burning of every kind of property whatever, instead

(a) *Indictment.* That heretofore to wit, on ———, at ———, to wit, at the county aforesaid, one ——— with force and arms, did wilfully and maliciously set fire to, burn and consume the dwelling-house of one ——— there situate.

If the building be not one of the specified ones, the value must be alleged. If the building were not burned, say, "did wilfully &c. set fire to, with intent to burn." On the general subject of arson, see 4 Black. 220—223; 2 Swift's Dig. 304.

of these numerous and yet very imperfect specifications? I can see no objection. The highest punishment might be for the burning of buildings, where life is endangered; and the rest might depend upon the amount of property endangered or destroyed. As the provisions stand, there is great want of discrimination in this respect.

Fraudulent conveyance and swindling. To guard the business transactions of men against fraud, deception, and imposition, in addition to the civil liability which they involve, the following penalties are provided. 1. Knowingly selling or conveying any tract of land, without having a title thereto, either in law or equity, by descent, devise, or other written evidence, with intent to defraud the purchaser—penitentiary from one to seven years. This has been mentioned before. 2. Committing a fraud upon the insolvent act, by concealing property, or fraudulently disposing of it—fine within five hundred dollars, or imprisonment within ten days, or both. 3. Obtaining from another, by any false pretence, any money or other value, with intent to cheat and defraud him; or fraudulently making and transferring any instrument of writing, with intent to defraud creditors—fine within five hundred dollars, or imprisonment within ten days, or both. These are the only provisions we have against what is commonly called *swindling*. It will be at once perceived that they are very far from including all the cases, in which knaves may cheat honest men.

Malicious destruction of property.(a) We have already considered one way of maliciously destroying property, namely, by burning. The other provisions on the subject are as follows. 1. Knowingly or maliciously destroying any private or public bridge, or any landmark or boundary properly established—fine within five hundred dollars, or imprisonment within thirty days, or both. 2. Knowingly and maliciously destroying or defacing any monument or tombstone—fine within two hundred dollars, or imprisonment within thirty days, or both. 3. Knowingly and maliciously altering or defacing any ear-mark or brand upon any horse, sheep, swine, or cattle of another—fine within fifty dollars, and liability in treble damages. 4. Knowingly and maliciously destroying any horse, sheep, swine, or cattle of another, unless found trespassing—fine within five hundred dollars, or imprisonment within twenty days, or both, and liability in double damages. Does not this indirectly sanction the killing of trespassing animals? 5. Knowingly and maliciously destroying trees in any nursery, garden, orchard, or yard, belonging to another—fine within five hundred dollars, and liability in double damages. 6. Knowingly and maliciously destroying any tree belonging to another, not within the foregoing description—fine within one hundred dollars,

(a) 4 Black. chap. 17.

and liability in double damages. 7. Knowingly and maliciously destroying any public ornamental tree—fine within one hundred dollars. 8. Knowingly and maliciously destroying or defacing any mile-stone or guide-board, on any public road—fine within fifty dollars, or imprisonment within ten days, or both. 9. By the act to prevent the destruction of timber, the destroying of any trees belonging to another is prohibited under a penalty within twenty dollars for each tree; but a distinction is made among different trees. 10. Intentionally obliterating or destroying any public notification set up by authority of law—fine within ten dollars, or imprisonment within one day, or both. 11. By the act for the better security of toll and other bridges, there is a penalty of between five and fifteen dollars for defacing any sign affixed thereto; and another within five dollars for riding or driving over such bridge faster than a walk. 12. Injuring or destroying trees on the lands belonging to the state, or otherwise trespassing thereon—fine within one hundred dollars, and imprisonment within twenty days. The above specifications furnish a remarkable instance of the particularity which I have so often referred to in the definition of offences. There certainly could be no difficulty in providing a general penalty for the malicious destruction of every kind of property without specification, but varying according to the value destroyed.

We have thus reviewed, as briefly as possible, the offences made punishable in this state, and the measure of punishment assigned to each. This examination has shown, that although our criminal code is yet crude and imperfect, its spirit is deserving of all commendation. The Dracos among mankind have had no part in it. Humanity has presided over every enactment. How remarkable the contrast between this country and England, where, in the time of Blackstone, there were no less than one hundred and sixty capital offences. (a) Our whole number of penal enactments scarcely amounts to this. We have but one capital offence; but two penitentiary offences for life; and the rest never exceed twenty years, and do not average more than ten. Then as to the minor punishments, imprisonment in jail is very rarely over thirty days, and does not average ten; and fines rarely exceed five hundred dollars, and do not average one hundred. On the score of humanity then, we may reasonably congratulate ourselves. Nor has experience thus far shown that we have erred in this benevolent way. Our criminal records will probably show as few prosecutions and as few depredations, in proportion to our population, as those of any other state or nation; although our local exposure to travelling depredators is very great. It will be observed that there is no provision against *compounding* or *compromising* a crime, between the party injuring and the party

(a) See 4 Black. 18.

injured, as there is in England. This will probably be considered as a defect. Again, there is no provision against *misprisions*, or the concealment of crimes having knowledge of their commission, as there is under the acts of Congress. Whether this be a defect, may be more questionable. Perhaps the duty of information may be safely left to the public spirit and private interest of individuals, without punishment, as we have seen it is without reward. On the whole, then, with little to censure, we have a great deal to admire, in our criminal code. The defects exist only in the details, and can be easily remedied; while the merits are fundamental, and characterize the entire system. You can hardly appreciate them as they deserve, unless by a comparison with some other system; and if you take that of England, it will be a contrast rather than a comparison.

LECTURE XXXVI.

CRIMES UNDER THE LAW OF THE UNITED STATES. (a)

§ 196. *Crimes relating to the currency.* The federal government, being framed and designed for national purposes only, as distinguished from local or municipal, we have seen that its power to define and punish crimes is limited, by this consideration, to a comparatively small number of cases, rendered absolutely necessary for its well being; while the general power of punishment is reserved to each state, as belonging to its internal police. We have already enumerated the cases to which the federal power of punishment extends, whether by express provision, or incidentally; but it will be proper here briefly to recapitulate them. Congress then has the *express power* of punishment in five classes of cases, namely;—1. Offences relating to the public securities and currency. 2. Offences committed on the high seas. 3. Offences against the law of nations. 4. Treason. 5. Offences committed in places of exclusive legislation. And Congress has exercised the *incidental power* of punishment in six classes of cases, making in all eleven, namely;—6. Offences against the revenue laws. 7. Offences against the Indians. 8. Offences against the post-office regulations. 9. Offences against foreign nations. 10. Offences against the federal government below treason. 11. Offences committed by federal officers. Instead

(a) See a good analysis of the criminal law of the U. S. in the preface to 2 Wheeler's *Crim. Cases*.

therefore of classifying these offences according to the subject-matter, as in the preceding lecture, I shall adopt the arrangement just indicated; except that the fourth and tenth classes will be united, in order to present at one view all the offences against the federal government. The description will contain all offences of any considerable importance; though some trivial ones may be omitted: at the same time, in aiming at brevity, I shall generalize, where the acts of Congress particularize.

By the federal constitution, Congress has power "to provide for the punishment of counterfeiting the securities and current coin of the United States." Under this provision, the following offences are made punishable; the description being abbreviated as much as possible. 1. Falsely making, altering, forging, or counterfeiting, with intent to defraud, any treasury note, or any writing, to obtain money from the United States, or their officers; or any certificate of public debt; or any letters-patent; or any writing to transfer public stock, or to receive any dividend thereon, or any pension from the United States; or any abstract or official copy of the registry, license, or enrolment of any vessel; or any certificate of ownership, passport, sea-letter, or clearance granted to any vessel; or any permit, debenture, or other document, granted by the officers of the customs; or procuring the same to be done; or assisting therein; or knowingly using any writing or document, thus done unto; or attempting so to do—fine within five thousand dollars, and imprisonment within ten years, varying according to the nature of the instrument. The act of 1790 punished some of these forgeries with death, but this is virtually repealed by milder provisions since enacted. 2. Falsely making, forging, altering, or counterfeiting any coins resembling the gold or silver coins of the United States, or foreign coins current therein; or procuring the same to be done, or assisting therein; or knowingly using or passing such coins or attempting so to do; or bringing such coins into the country for the purpose of using or passing them—fine within five thousand dollars, and imprisonment within ten years. For similar offences upon the copper coin—fine within one thousand dollars and imprisonment within three years: and there is a penalty of ten dollars for using any copper coins except cents and half cents. 3. Any person employed at the mint debasing or making too light any of the coins there struck, with intent to defraud; or embezzling any of the metals left there to be coined—fine within ten thousand dollars, and imprisonment within ten years. 4. Impairing, clipping, diminishing, or falsifying any of the gold or silver coins current in the country, with intent to defraud—fine within two thousand dollars, and imprisonment within two years. It only remains to be observed, that as to most of the offences now described, the jurisdiction of the state courts is expressly reserved; and we have already seen that state legislation has undertaken to provide for them. As to

the coins, however, doubts exist on two points, namely; first, whether the state legislatures have any authority to legislate on the subject; and secondly, whether in the absence of state legislation, the state courts can entertain jurisdiction of the offences provided for by Congress, with an express reservation of state jurisdiction. I merely state these questions, without intending to discuss them; having already considered the subject of jurisdiction as fully as my limits will permit.

§ 197. *Crimes on the high seas.* (a) Congress has express power "to define and punish piracies and felonies committed on the high seas;" because *the high seas* are not within the jurisdiction of any particular state. They are the common highway of all nations, and crimes there committed are the proper subjects of national cognizance. The high seas include not only the ocean proper, but also every river, haven, harbor, basin, bay, or roadstead, without the jurisdiction of particular states, or where the tide ebbs and flows. The offences provided for, are the following, very much abridged. 1. *Piracy.* This is an offence against the law of nations, a pirate being considered as the enemy of all mankind; and by the law of nations piracy is robbery on the high seas, and is punishable with death. By the acts of Congress piracy is also punishable with death, and the following offences, committed on the high seas, are declared to be piracy, namely; *First*, any person committing robbery, or murder, or any other capital offence by the laws of the United States. *Secondly*, any master or mariner piratically running away with any vessel, or with goods or merchandize of the value of fifty dollars; or voluntarily giving up a vessel to pirates. *Thirdly*, any seaman laying violent hands upon his commander, to prevent his fighting in defence of his vessel or goods; or making a revolt in the vessel. But in these cases, if the vessel be foreign, and the offence be not committed by or upon an American citizen, our courts will not entertain jurisdiction. *Fourthly*, any American citizen, committing any piracy aforesaid, or any act of hostility against the United States or citizens thereof, under color of any foreign commission or authority. *Fifthly*, any person, on land or water, knowingly procuring, assisting, or commanding a piracy to be committed, and thus becoming an accessory before the fact. *Sixthly*, any person committing piracy, as defined by the law of nations. But this being merely robbery, is before provided for. *Seventhly*, any person committing the crime of robbery upon any vessel, cargo, or crew. But this is also provided for before. *Eighthly*, any person belonging to any piratical vessel, or engaged in any piratical enterprise, landing from such vessel and commit-

(a) See acts of 1790, 1804, 1819, 1820, 1825; 4 Black. 71; U. S. v. Ross, 1 Gallison, 624; U. S. v. Smith, 1 Mason, 147; U. S. v. Bevans, 3 Wheat, 336; U. S. v. Palmer, 3 Wheat. 610; U. S. v. Wiltberger, 5 Wheat. 76; U. S. v. Smith, 5 Wheat. 153; U. S. v. Pirates, 5 Wheat. 184; U. S. v. Holmes, 5 Wheat. 412.

ting robbery on shore. But this does not affect the local jurisdiction. *Ninthly*, any American citizen belonging to a foreign vessel, or any person belonging to an American vessel, landing upon a foreign shore, and, by force or otherwise, bringing away any negro or mulatto, not a slave by the laws of the United States; or receiving him on board; or forcibly detaining him on board; or assisting therein; or attempting to sell him; or transferring him to another vessel; or landing him on shore; with intent to make him a slave. This language is designed to be sufficiently comprehensive to include any agency or concern whatever in the slave trade. 2. *Being accessory to piracy after the fact*, by knowingly harboring or concealing a pirate; or receiving or taking charge of any vessel or cargo taken by a pirate—fine within five hundred dollars, and imprisonment within three years. 3. *Man-slaughter*. But this not being defined by Congress, the common law definition is adopted, which has before been given—fine within one thousand dollars, and imprisonment within three years. 4. Endeavoring to induce any officer or mariner of a vessel, to turn pirate; or yield up the vessel to pirates; or run away with the vessel or cargo—same punishment as above. 5. Knowingly confederating with pirates; or trading with them; or furnishing them supplies—same punishment as above. 6. Confining the master of a vessel, or endeavoring to make a revolt therein—same punishment as above. 7. *Murder or rape*; or inflicting a mortal blow or wound, or poisoning so that death afterwards ensues on shore; or aiding or advising therein—death. Here again, the common law definition of murder is adopted; which is the unlawful killing of another with malice aforethought, either express or implied; and there are no degrees. So of rape, which is the having carnal knowledge of a woman forcibly and against her will; and there are no distinctions as under the state law. 8. Attacking any vessel with intent to plunder, rob, or despoil the same—fine within five thousand dollars, and imprisonment within ten years. 9. Breaking or entering any vessel, boat, or raft, with intent to kill, rob, or steal, or to commit a rape or other felony—fine within one thousand dollars, and imprisonment within five years. 10. Maliciously cutting or destroying any cordage, cable, buoy, buoy-rope, head-fast, or other fastening of any vessel, boat, or raft—same punishment as above. 11. Plundering from any vessel, boat or raft, which has been wrecked, or is in distress—fine within five thousand dollars, and imprisonment within ten years. 12. Wilfully obstructing the escape of any person from any vessel, boat, or raft, which has been wrecked, or is in distress—same punishment as above. 13. Wilfully decoying a vessel, boat, or raft into danger, by showing false lights, or extinguishing true lights—same punishment as above. 14. Any commander of an American vessel, putting any officer or mariner thereof belonging to this country, on shore in a foreign country,

and leaving him there; or refusing to bring him home, he being able and willing to return—fine within five hundred dollars, and imprisonment within six months. 15. Assaulting another, on board an American vessel, with a dangerous weapon; or with intent to kill, rob, or steal, or to commit a rape, mayhem, or other felony—fine within three thousand dollars, and imprisonment within three years. 16. Committing mayhem on board an American ship, by cutting, disabling, putting out, or destroying the eye, nose, lip, tongue, ear, or other limb, or member, with intent to maim or disfigure—fine within one thousand dollars, and imprisonment within seven years. 17. Committing larceny to any amount, on board an American ship, or aiding therein—fine of fourfold the value stolen, and stripes not exceeding thirty-nine. Thus there is no distinction between grand and petit larceny, as under the state law; but the criterion of the offence is the same as there, namely, the felonious taking and carrying away. 18. Being accessory to larceny after the fact, by receiving or concealing the goods or thief—same punishment as above; but by a subsequent act—fine within one thousand dollars, and imprisonment within three years. 19. Being guilty of misprision; that is, having knowledge of the commission of a felony, and concealing the same, or not disclosing it to the civil or military authorities of the United States—fine within five hundred dollars, and imprisonment within three years. We have seen that there is no such provision under the state law. 20. Wilfully casting away, burning, or otherwise destroying any public or private American vessel, or procuring the same to be done, or aiding therein—death. 21. Conspiring to destroy any vessel as aforesaid, or to procure the same to be done; or fitting out any vessel with intent that the same may be thus destroyed—fine within ten thousand dollars, and imprisonment within ten years. 22. Any American citizen, without our jurisdiction, being concerned in fitting out or arming any vessel, to cruise against our citizens—fine within ten thousand dollars, and imprisonment within ten years. Such are the offences committed upon, or having reference to the high seas, for which Congress has made specific provision. To avoid nice questions of jurisdiction, it is further declared that if any of the foregoing offences be committed on board of an American vessel lying at a foreign port, they shall be punished in the same manner as if such vessel had been at sea. The only ground for fear is, that the above enumeration is not sufficiently extensive. Are there not offences, deserving of punishment, which cannot be punished under these provisions? To provide for such cases, if there be any, there might be a general provision, punishing every other act committed on the high seas, which would be punishable if committed on land, in those places which are within the exclusive jurisdiction of the United States. It is to be regretted that the constitution did not employ a word more definite than *felony*;

or that Congress, in repeating it, did not give it a definition. As the provisions now stand, it seems to imply every offence for which Congress sees fit to provide. There is not the same objection to the use of the terms murder, manslaughter, rape, robbery, and larceny, without defining them; because these are sufficiently defined by recourse to the common law. You will observe that murder and manslaughter in these provisions, taken together, include the same offences as murder and manslaughter under the state law. But the addition of murder in the second degree, by the state law, makes the transition from murder to manslaughter less abrupt than it is here; and is therefore an improvement.

§ 198. *Crimes against the law of nations.* (a) What constitutes the law of nations, has already been briefly explained; and the reason why the power to punish infractions of this law has been expressly conferred on Congress, has also been considered. Blackstone has described these offences with great clearness and brevity, under three heads. 1. Violation of safe conducts. 2. Infringement of the rights of ambassadors. 3. Piracy. Congress has adopted this division, except that piracy is provided for under the preceding head. 1. Violating any safe-conduct, or passport duly issued under the authority of the United States—fine at the discretion of the court, and imprisonment within three years. 2. Doing any species of violence to any foreign ambassador, or other public minister—same punishment. Nor is this all; for if any person sue out or prosecute any writ or process, from any federal or state court, against any foreign ambassador or other minister, or against his domestic or servant, not only is such process absolutely void; but the person ordering it, and his attorney, and the officer executing it, are each liable to the punishment before indicated. This provision however does not protect such domestic or servant, as to debts contracted before entering into such service; nor in any case, unless his name is registered with the secretary of state, and by him transmitted to the marshal of the district. Congress has made provision for punishing several other offences against foreign nations, in violation of our peace or neutrality; but these, not being defined by the law of nations, are arranged under another head. The importance of the foregoing provisions is at once perceived. Safe-conducts, and passports are granted, as we have before seen, for the protection of aliens, within our jurisdiction, and the national honor is pledged for their being respected; while the complete immunity of foreign ministers and their families, is a fundamental condition of diplomatic intercourse. If they misbehave themselves, their recall may be demanded; but while they remain here, their persons must be inviolate.

(a) See 4 Black. chap. 5.

§ 199. *Treason, and other crimes against the general welfare.* Under this head, besides treason, which is expressly provided for, I shall include a variety of offences injurious to the general good, which Congress has provided for, in virtue of its incidental power, and which do not properly fall within either of the other divisions.

1. *Treason.* (a) This offence stands highest on the list of crimes, because it strikes directly at the welfare of society. Being a violation of that allegiance, which every citizen owes to his government, it can only be committed by a citizen. Under arbitrary governments it has always been made a ready pretext for cutting off obnoxious individuals. Even in England, some of the best and purest blood has been shed in its name. By reference to Blackstone, it will be seen that a variety of acts, and even of imaginations, are there declared to be treason; and the punishment is the most horrible that language can express. But the framers of our constitution, as we have seen, took special care to guard our citizens against the unwarrantable exercise of so tremendous a power, by declaring what should constitute treason, by what testimony it should be proved, and what should be the extent of its punishment. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Here then we have two acts, and only two, which can amount to treason. This language is copied literally from one of the English statutes, and the English decisions may therefore be consulted for its interpretation; but with regard to the meaning of the phrase, "*levying war*," we have interpretations of our own. War can only be levied by employing actual force. Troops must be openly raised and embodied. A secret meeting of conspirators, though with a treasonable intent, would not amount to a levying of war; nor would the mere enlistment of men to serve against government. There must be an actual and visible demonstration of war, by gathering together in hostile array. With regard to the other branch of the definition, we have happily had no occasion to give it a construction; but its meaning obviously is, taking part with our enemies in time of war, and rendering them actual assistance against our own government; either by joining their ranks and fighting for them; or by furnishing them with information or materials, provisions or ammunition. "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." This declaration excludes circumstantial evidence, and the evidence of private confessions, except by way of corroboration, after two witnesses

(a) See act of 1790; 3 Story's Com. 169; 4 Black. chap. 6; 2 Swift's Dig. 264; 2 Wheeler's Crim. Cases, pref. 23; Burr's Trial, reported in 2 volumes; U. S. v. Vigol, 2 Dall. 346; U. S. v. Mitchell, 2 Dall. 348; Ex parte Bollman, 4 Cranch, 75; Opinion in the case of Burr, 4 Cranch, 470; Story's Charge, 1 Story's Rep. 614.

have sworn to the same overt act. In all other cases, a single witness, uncontradicted, may procure a conviction; but in treason, there must not only be two witnesses, but they must testify to the same act, and that must be an overt act. The importance of this provision can be fully appreciated by those only, who have read the English trials for treason, and seen upon what slender and pitiful testimony convictions have there been procured. "Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Congress has declared that the punishment shall be death by hanging; and without any of those barbarous and disgusting aggravations mentioned by Blackstone. We have before seen that it is questionable whether treason may not also be a state crime. Many of the states so regard it, and make provision for its punishment. Such was the fact in this state until 1824. But it is evident that to make treason a state crime, there must be some different definition; because, each state being a part of the United States, the acts embraced in the foregoing definition, though committed against a single state, would still be treason against the United States.

2. *Misprision.* (a) The literal meaning of *misprision* is neglect or contempt. At common law all high offences below the degree of capital were punishable as *misprisions*. They were divided into two classes; negative *misprisions*, which consisted in the concealment of something which ought to be revealed; and positive *misprisions*, which consisted in doing something which ought not to be done. To the first class belonged the concealment of any treason or felony, in which the person so concealing his knowledge, had no participation. To the second class belonged misconduct of public officers, and contempt of the constituted authorities. But we have no such general provisions against *misprisions*. In the statutes of this state the term is not mentioned; nor is there any provision resembling it, unless it be that which punishes the concealing of stolen goods or harboring the thief. But Congress have provided for punishing *misprision* of treason and felony. *Misprision* of treason is where any person, knowing of the commission of treason, does not forthwith disclose the same to the executive or judicial authorities of the United States, or of one of the states. The punishment is imprisonment not exceeding seven years, and a fine not exceeding one thousand dollars. *Misprision* of felony consists in the concealing of any felony made punishable by the United States, or not revealing the same to the civil or military authorities. The punishment is imprisonment not exceeding three years, and a fine not exceeding five hundred dollars. It is unfortunate that this term *felony*, so often used in criminal legislation,

has not been defined by statute. At common law, (a) it was the general name for every crime which occasioned a forfeiture of lands or goods. But such cannot be the criterion in this country, because forfeiture is here abolished as a part of punishment. When Congress use the term, felony, they seem to include in it every capital offence except treason, and this is the sense in which Blackstone, after much discussion, concludes to use the term. Under the law of Congress then, the concealment of any capital offence other than treason, is punishable as a misprision of felony.

3 *Criminal correspondence with foreign powers.* Any resident alien, or any citizen resident or not, being concerned in any correspondence with a foreign government, with intent to influence its measures in relation to any controversy with this government, or to defeat the measures of this government—fine within five hundred dollars, and imprisonment between six months and three years. This offence, it will be seen, partakes somewhat of the nature of treason. But it is declared not to include the case where an individual merely seeks from a foreign government redress for a private injury.

4. *Bribery.* 1. Directly or indirectly bribing any judge of the federal courts, with respect to any order, judgment, or decree—fine and imprisonment of both parties, at the discretion of the court, and future disqualification of the judge to hold any office. 2. Bribing a custom house officer to swerve from his duty—fine for both parties between two hundred and two thousand dollars.

5. *Resistance of officers.* Knowingly obstructing or resisting any officer in the execution of any judicial order or process of the federal courts; or assaulting, beating, or wounding such officer—fine within three hundred dollars, and imprisonment within one year.

6. *Rescuing prisoner.* 1. Rescuing or liberating, by force, any person convicted of a capital offence—death. 2. Rescuing a prisoner under any other circumstances—fine within five hundred dollars, and imprisonment within one year.

7. *Vacating records.* Feloniously stealing, altering, falsifying, or otherwise avoiding any record, process or other proceeding in the federal courts, so as to defeat any judgment therein—fine within five hundred dollars, or imprisonment within seven years, or stripes not exceeding thirty-nine.

8. *False personation.* Acknowledging any recognizance, bail, or judgment in the federal courts, in the name of any person not privy or consenting thereto—same punishment as above.

9. *Perjury.* Wilfully and corruptly committing perjury, or procuring perjury to be committed, in any matter pending in the federal courts, or in any deposition required by law—fine within eight hundred dollars, imprisonment within three years, pillory

(a) 4 Black. chap. 7.

one hour, and future incompetency as a witness. But by a subsequent act of 1825, perjury, or subornation of perjury, in any case where the laws of the United States require an oath or affirmation to be taken, is punished by a fine within two thousand dollars, and imprisonment within five years. This last provision, in addition to the above, includes perjury in relation to public money, provided for in the act of 1823; perjury before committees of Congress, provided for by the act of 1798; perjury in relation to the customs, provided for by the act of 1799; and perjury under the insolvent act, provided for by the act of 1800. It therefore virtually repeals the former acts. You will observe that the act of Congress does not specify in what perjury shall consist; and therefore, recourse is had to the common law definition before adverted to.

§ 200. *Crimes committed in places of exclusive federal jurisdiction.* (a) We have seen that Congress has power, "to exercise exclusive legislation, in all cases whatsoever, over such district, not exceeding ten miles square, as may by cession of particular states, become the seat of government of the United States; and to exercise like authority over all places, purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." In these places, therefore, Congress provides for the punishment of crimes. And as the power to do a thing, implies the power to do it effectually, Congress may provide for apprehending an offender escaping from these places; and for transporting such offender to or from these places, for trial or execution. And unless state jurisdiction over such places has been expressly reserved, in the cession thereof, it entirely ceases. The offences, in these places, provided for by Congress, are as follows: 1. *Murder*, the punishment of which is death, and there is no distinction of degrees. 2. *Manslaughter*, as defined by the common law—fine within one thousand dollars; and imprisonment within three years. 3. *Arson*. Maliciously burning any dwelling house, or any barn, stable, or other building connected therewith; or advising or aiding therein—death. 4. *Other burning*. Maliciously setting fire to or burning any other building, vessel, timber, stores, provisions or other property, specified in the act; or advising or aiding therein—fine within five thousand dollars, and imprisonment within ten years. 5. *Misprision, mayhem, larceny, and being accessory to larceny after the fact*—the same as on the high seas, before described. There is also a general provision, that if any offence be committed in these places of exclusive federal jurisdiction, for which Congress has not made specific provision, the punishment shall be the same, as the state in which the same is situated, provides

(a) See *Cohens v. Virginia*, 6 Wheat. 264; *Commonwealth v. Clary*, 8 Mass. 72.

for such offence. This is a convenient method of supplying the manifest deficiencies in the foregoing specifications.

§ 201. *Crimes against the revenue laws.* The power to punish these offences is incidental, as we have seen, to the power to raise and disburse the revenue. There are nearly fifty in number; and they are so framed as to meet every anticipated attempt, either by revenue officers or other persons, to defeat or defraud the revenue. The punishments consist entirely of fines or forfeitures; and the prosecutions may be commenced at any time within five years. I shall omit a description of these offences, for two reasons; first, on account of their peculiar character, they affect only that class of persons immediately connected with the revenue, and have no general application to the public at large; and, secondly, they could not be described so as to be understood, without a full account of our revenue system, for which I have not room.

§ 202. *Crimes against the Indians.* The power to punish these offences, is incidental, as we have seen, to the power to regulate commerce with the Indians. And the following is a summary of the offences provided for. 1. Any citizen or resident of the United States entering any territory secured by treaty to the Indians, for the purpose of hunting or grazing therein—fine within one hundred dollars, and imprisonment within six months. 2. Entering the territory secured to the Indians, south of the Ohio river, for any purpose whatever, without a passport from the proper authority—half the above penalty. 3. Entering the Indian territory with a hostile intention, and committing any offence against the person or property of any friendly Indian, which would be punishable if committed upon a citizen within our jurisdiction—fine within one hundred dollars, and imprisonment within one year; if property be taken or destroyed—remuneration in double value; and if murder be committed—death. 4. Surveying or settling upon any land belonging to Indians, or attempting so to do—fine within one thousand dollars, and imprisonment within one year. 5. Attempting to reside among the Indians as a trader, without license from government—fine within one hundred dollars, imprisonment within thirty days, and forfeiture of merchandize. 6. Purchasing from Indians any utensil for hunting or cooking, or any article of clothing except skins or furs—fine within fifty dollars, and imprisonment within thirty days. 7. Purchasing a horse from an Indian, without license—fine within one hundred dollars, imprisonment within thirty days, and forfeiture of the horse. 8. An Indian agent being concerned in any trade with Indians on his own account—fine within one thousand dollars, and imprisonment within one year. 9. Treating with Indians for the purchase of land, without authority from government—same punishment. 10. A foreigner going into the Indian territory without a pass-

port—same punishment. 11. Any Indian or other person committing, within the Indian territory, any offence which would be punishable, if committed within places of exclusive federal jurisdiction—the same punishment as is there provided for. All these provisions are intended for the benefit of the Indians, and their spirit cannot be too much applauded. But experience has proved them to be altogether insufficient to protect these helpless children of nature against circumvention and imposition by white adventurers among them.

§ 203. *Crimes against the post-office regulations.* The power to punish these offences is incidental, as we have seen, to the power to establish post-offices and post-roads; and the offences provided for are as follows. 1. Any person connected with the post-office department, unlawfully detaining or opening any letter, or packet, or mail of letters not containing money or other evidence of value—fine within three hundred dollars, or imprisonment within six months, or both. If such letter, packet or mail contain money or other evidence of value—imprisonment from ten to twenty-one years. For the same offence with respect to newspapers—fine within fifty dollars. 2. Any person not connected with the department, stealing, opening, or destroying the mail, or any letter or packet therein, not containing money or other evidence of value—fine within five hundred dollars, and imprisonment within one year. If the same contain money or other evidence of value, imprisonment from two to ten years. For the same offence with respect to newspapers—fine within twenty dollars. 3. Buying, receiving or concealing any thing, knowing the same to have been robbed, stolen or embezzled from the mail; or otherwise becoming accessory after the fact—fine within two thousand dollars, and imprisonment within ten years; with special provision that the principal need not be first convicted. 4. Any person having charge of the mail, quitting or deserting the same before delivering it to the proper person at the end of his route—fine of five hundred dollars; and if such person receive or carry any letter or packet, otherwise than in the mail, or procure the same to be done—fine within fifty dollars. 5. Robbing any carrier of the mail, or person intrusted therewith, of such mail or any part thereof—imprisonment from five to ten years for the first offence, and death for the second. But if, in committing the first offence, the carrier be wounded or his life threatened by dangerous weapons, the punishment is death. 6. Attempting to rob the mail, by assaulting or threatening the carrier—imprisonment from two to ten years. 7. Doing any injury to the bag, valise, or portmanteau, in which the mail is carried, with intent to rob or steal therefrom—fine from one hundred to five hundred dollars, and imprisonment from one to three years. 8. Concealing a letter or other writing in a newspaper, pamphlet, or magazine, or writing any thing thereon, for the purpose of avoiding letter postage—

fine of five dollars, and full charge as for letter postage. 9. Advising, procuring, aiding, or assisting in the commission of any of these offences—same punishment as the principal. Where the punishment is a fine, in all these cases, one half goes to the informer. This is one of the very few cases, in which pecuniary inducement is held out to informers.

§ 204. *Crimes against foreign nations.* Under this head I shall include several offences, made punishable by virtue of the incidental power which the federal government has to keep peace with foreign nations, and preserve a strict neutrality with respect to their controversies. 1. Any American citizen, within our jurisdiction, accepting and exercising a commission to serve one foreign government, by land or sea, against another foreign government at peace with us—fine within two thousand dollars, and imprisonment within three years. The design of this provision being to prevent our citizens from involving this nation in the quarrels of other nations, to the injury of our neutral policy, it prohibits foreign service only in those cases where it would have that tendency. 2. Any resident, whether citizen or alien, within our jurisdiction, enlisting or procuring another to enlist, in the service of any foreign government, on board of any vessel of war, letter of marque, or privateer—fine within one thousand dollars, and imprisonment within three years. The design of this provision being the same as of the preceding, it does not include an enlistment made by a foreigner, on board of a foreign ship, which happens to be temporarily within our jurisdiction. 3. Any person within our jurisdiction, whether citizen or not, being concerned in fitting out or arming any vessel for the service of one foreign government against another, with whom we are at peace—fine within ten thousand dollars, imprisonment within three years, and forfeiture of the vessel and furniture. 4. Any person, within our jurisdiction, whether citizen or not, being concerned in augmenting the force of any vessel in the service of one foreign government at war with another, with whom we are at peace—fine within one thousand dollars, and imprisonment within one year. 5. Any person within our jurisdiction, whether citizen or not, being concerned in setting on foot any military expedition against any foreign government with whom we are at peace—fine within three thousand dollars, and imprisonment within three years.

§ 205. *Crimes committed by federal officers.* These offences are provided for by virtue of the incidental and inherent power, which every government has to protect itself from injury by its own functionaries. Some of them have already been described; others are peculiar to certain particular officers, and are not of sufficient general interest to call for any description; but the following apply to all coming within their principle. 1. Any officer connected with the judicial department, knowingly receiving or

demanding unlawful fees—fine within five hundred dollars, and imprisonment within six months. 2. Any officer of the federal government being guilty of extortion under color of his office—fine within five hundred dollars, and imprisonment within one year. 3. Any person having charge of the public arms, stores, munitions of war, or other property, wilfully embezzling or purloining the same—fine of fourfold the value, and stripes not over thirty-nine.

The view now presented of the criminal code of the United States, is necessarily imperfect, from its brevity: but it answers the purpose I had in view, which was to make you acquainted with the extent of federal power, on the subject of crimes and punishments. Should you have occasion to prosecute or defend for any of these crimes, you will of course consult the statutes, for their exact definition. On the score of lenity, you will remark a considerable difference between the state and federal provisions. Here we have nine capital offences; namely, forgery, piracy, murder, rape, destroying a vessel, treason, rescuing a prisoner convicted of a capital offence, arson, and mail-robbery. The average of fines too is very much higher: but on the other hand there is only one case of imprisonment for more than ten years. Again, whipping may be inflicted in two instances, and the pillory in one. You will also remark that the provisions are more general for the punishment of accessories before and after the fact; but even here, they are not universal, as they should be. Nor is there any general provision, that the accessory may be punished without the conviction of the principal, though this is provided in some cases. The provision against misprisions is general, but there is none against compounding offences. Taking all the provisions together, however, they probably meet sufficiently the chief exigencies of the federal government. In their details, as we have seen, they are obnoxious to criticism, in not clearly defining the terms employed. They are also deficient in method and arrangement, from having been made by piecemeal. For these reasons, a general and systematic revision of the whole subject, would be an improvement.

PART VI.

THE LAW OF PROCEDURE.

LECTURE XXXVII.

CIVIL PROCEEDINGS IN COURTS OF LAW. (a)

§ 206. *Redress without suit.* I now enter upon the sixth part of these lectures, in which I am to consider *the law of procedure*, or, as it is more commonly called, *practice*. I have reserved this branch of our inquiries until now, in compliance with the general custom, which is to treat of rights first, and then remedies; or, in other words, to discuss law in the abstract, before attending to its practical application. But for this general custom, I should have been inclined to prefer the synthetic to the analytic method; for I believe that the simplest way of teaching the elements of law, would be to begin with a single case of injury or wrong, and trace the proceedings with respect to it historically, from the first violation of the law, up to the last step in the attainment of the remedy, in every form in which it can be administered. The student would thus be the better prepared for understanding legal rights in all their bearings and relations, by having first acquired a general idea of the mode in which legal remedies are applied. This may be mere conjecture: but the experiment would be worth making. I have, however, complied with the general custom, and reserved remedies until the last. Having, therefore, considered what our rights are, I am now to indicate the course of proceeding when those rights are violated. This is regulated almost entirely by the common law, and is, of course, very nearly the same in all the American as well as English courts. The organization of our federal and state courts, and the general apportionment of jurisdiction among them, has been sufficiently considered in the eighth lecture, on the judicial department. And our remaining inquiries naturally fall into three divisions; namely, first, civil proceedings in courts of law; secondly, civil proceedings

(a) On the general subject of practice, see the third book of Blackstone; the third book of Swift; Howe's Practice; Duer's Practice; Tidd's Practice; Chitty's Practice; Archbold's Practice; Selwyn's Nisi Prius, with Notes by Wheaton; Buller's Nisi Prius; Espinasse's Nisi Prius; Chitty, Stephen, Gould, and Lawes on Pleading; Wilcox's Forms; Leigh's Nisi Prius; Stephens' Nisi Prius.

in courts of chancery; thirdly, criminal proceedings; to each of which I shall devote one lecture. But before proceeding to the main subject of this lecture, I shall notice the principal modes of redress without suit.

1. *Defence of persons and property.* This falls more properly under the head of prevention than redress, and has been before referred to. As a general rule, every one is allowed to prevent a threatened injury to the person or property, either of himself, or of those who stand in the relation of husband or wife, parent or child, master or servant, guardian or ward, by using just so much force as is necessary to prevent the injury, and no more. To exceed this limit would be to convert defence into aggression. The law designs to furnish a shield only, not a sword.

2. *Reprisal.* (a) If without personal violence amounting to a breach of the peace, one can, by seizure or entry, as the case may be, recover the possession of any property, or the custody of a wife, child, servant, or ward, wrongfully withheld from him, the law justifies him in so doing. But no personal violence is permitted, in making such recaption or reprisal; because, as a general rule, this would be to redress one wrong by doing another and greater.

3. *Abatement of nuisances.* (b) The causing of certain specified nuisances is usually punished as an offence. But the term, nuisance, comprehends whatsoever unlawfully annoys or does damage to another, in contravention of that great rule of right, so use your own as not to injure others. When, therefore, one suffers from a nuisance, as thus defined, the law permits him to abate it; that is, remove it in a summary manner, if this can be done without riot or personal violence. Moreover, damages may be recovered at law for the injury thus sustained, in an action on the case, to be described hereafter.

4. *Distreining property.* (c) Under the English law, the right of distreining property is deemed of great importance. When rent is in arrear, landlords are permitted to seize the chattels of their tenants on the leased premises, in satisfaction thereof; and trespassing animals may likewise be seized by the owners of the land on which they trespass, to indemnify themselves for the injury thus committed. To try the legality of such seizures, the action of *replevin* is resorted to, as will be seen hereafter. But in this state no such summary proceeding is allowed, except for the collection of debts due to the state. Landlords cannot distrein for rent, and trespassing animals are the subject of special statutory regulations.

5. *Accord and satisfaction.* (d) This takes place when the parties themselves agree upon the satisfaction to be rendered for any injury, which they are permitted to do in all cases not crimi-

(a) 3 Black. 4.

(b) 3 Black. 5.

(c) 3 Black. 6

(d) 3 Black. 16.

nal; and if such agreement be performed, the accord and satisfaction form a complete bar to any action by the injured party. The law, which always endeavors to discourage litigation, will not disturb a compromise thus made.

6. *Arbitration.*(a) This takes place when parties refer any matter in controversy to the decision of third persons. The act of reference is technically called *submission*; the persons to whom the reference is made *arbitrators*; and the decision made by them, *award*. At common law, any thing may be the subject of arbitration, which is not criminal. The usual mode of submission is by a penal bond, specifying the particulars submitted, and conditioned for the performance of the award when made; but any other form of agreement will be valid, if sufficiently specific. A court of equity will not compel the specific performance of an agreement for submission; but when an award has once been made, it is held conclusive between the parties, unless it be set aside for fraud, accident, or mistake; and if either party refuse to perform it, the other may resort to chancery for a specific performance, or seek damages at law for nonperformance; or if either party should sue upon the original subject of controversy, the award may be pleaded in bar of such suit. These general principles of arbitration have been long settled by the common law, but in almost every state statutory provisions have been superadded. Thus our statute provides for submitting all controversies to arbitration, except those which involve the title to realty, and for making such submission a rule of court; the advantage of which is, that judicial process may then be had for the procurement of testimony, and when the award has been properly made, the court will enforce its performance, as if it were a verdict, without a separate suit. To attain this advantage, the directions of the statute must be strictly pursued; but the common law of arbitration is not thereby abrogated; and therefore proceedings in arbitration may be effectual at common law, when they cannot be made a rule of court.

§ 207. *Redress by suit.* The result of violating any legal right is an *injury* or *wrong*. If it be of a highly dangerous or atrocious character, the *public* take it up, and punish it as a *crime*. If not, it is regarded merely as a *private* affair between man and man, for which the injured party has his *civil remedy* against the other. This remedy is secured, as we have seen, by a solemn assurance in the constitution, "that all courts shall be open; and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without denial or delay." Indeed, this is only the expression of one of the fundamental articles of the

(a) 3 Black. 16; 2 Story on Equity, 675; Kyd on Awards; Caldwell on Arbitration.

social compact, by which, in return for the relinquishment of private redress, society undertakes to settle controversies between its members, according to the principles of justice, as defined by law. We must observe, however, that it is not every injury, in the estimation of individuals, for which a remedy is promised; but only those injuries for which a remedy can be had "*by due course of law*;" and these injuries must relate either to the "*lands, goods, person, or reputation*" of individuals. The terms "*lands and goods*," as before explained, are technical words, used to designate property; the former embracing *real property*, and the latter *personal*. While the terms "*person or reputation*," are in like manner used to designate our *personal rights or immunities*. The meaning, therefore, is, that all injuries which the law can redress, must relate either to the *person or property* of individuals; and this agrees with the remark heretofore made, that all laws have such relation. Hence, it will be inferred, that some of the keenest injuries to the feelings or affections which persons of refined sensibilities can suffer, must be left unprovided for; and this agrees with another remark, that the law does not undertake to regulate *moral right and wrong*. The terms above employed, "*for an injury done him*," might seem to imply, that the law only undertakes to redress *injuries of commission or positive injuries*. But, in fact, provision is equally made for *injuries of omission or negative injuries*. Every denial to another of that which is his legal right, is as really a wrong, as that which results from a direct act; otherwise, there would be no remedy for the nonperformance of contracts, or the refusal to comply with any other legal obligations. Such, then, is the general character of *civil injuries or wrongs*; but it should be observed that the law commonly uses the Latin word *delictum* or the French word *tort*, instead of our equally significant English words. The remedies thus provided are called *civil*, to distinguish them from *criminal proceedings*. They are of two kinds; namely, those which are administered by *courts of law*, and those which are administered by *court of equity*; and they will be found to differ essentially from each other, both in point of form and efficiency.

§ 208. *Actions.* (a) We are now to consider in what manner the law proceeds to administer civil remedies. These remedies are administered by courts, through the instrumentality of what are called *actions*. The term *action* includes the whole course of legal proceedings to obtain redress for a civil injury. The *parties* to an action are denominated *plaintiff* and *defendant*; and the former is said to *sue* or *prosecute* the latter. Hence, the term *suit* is sometimes used instead of action. In some few instances, the redress sought by a civil action, consists in the recovery of *some specific article of property*, wrongfully withheld from the

(a) See 3 Black. 116; 1 Chit. Plead. 83.

plaintiff by the defendant; but most frequently the object of an action is to obtain *compensation in money* for an injury complained of, which compensation is technically called *damages*. It is obvious that for *injuries to property*, this is generally the most easy and natural kind of redress, since money is the universal measure of value; and besides it is often impracticable to obtain *satisfaction in kind*. But it may at first view appear strange, that pecuniary damages should be the redress sought for *personal injuries*, since we are accustomed to hold personal immunities to be beyond all price. If my property has been injured, or my dues withheld, I can readily tell the exact sum which will make me whole; but if my body has been bruised, my health impaired, or my reputation slandered, how can I tell what amount of money will compensate me for the injury? It is evident that strictly speaking, there can be no *equivalent* in such cases; but it is also evident, that unless we resort to the principle of *retaliation*, which vindictively doubles the amount of injury, pecuniary damages, though often inadequate, constitute the only satisfaction which the law can furnish. Were we now at liberty to classify actions, upon any principle of analysis, it would follow, from what has been said, that only two classes would be necessary; and these might be, *first*, for injuries to the person and for injuries to property; or, *secondly*, for injuries of commission and for injuries of omission; or, *thirdly*, for the recovery of the specific thing and for the recovery of pecuniary damages. But instead of a simple and natural division of actions, such as either of these would be, we are compelled, by peculiar circumstances in the history of the common law, to recognize a perplexing variety of actions abounding with arbitrary and technical distinctions. The customary division of actions is into *real*, *personal*, and *mixed*. *Real actions* are those used for the recovery of real property only, without damages. *Personal actions* are those used for the recovery of personal property or damages. And *mixed actions* are those used for the recovery of real property and damages. But in this, and several other states, real actions are not in use; their place being supplied by the mixed action called *ejectment*, which answers every useful purpose, and is the only mixed action now in use. Personal actions are again subdivided into *actions ex contractu*, or *actions of contract*, and *actions ex delicto*, or *actions of tort*.

To account for this diversity of civil remedies, we must look back to the history of actions; and let me apprise you before hand, that you will find very little of that adaptation of means to ends, which is calculated to gratify a philosophic mind. On the contrary you will find that the remedial part of the law resembles a mass of patchwork, made up at intervals and by piecemeal, without any preconceived plan or system, for the purpose of meeting the exigencies of the times by temporary expedients. It

will be well to bear this in mind, while considering the forms of action; for it will help you to account for combinations and classifications, which would otherwise be unaccountable. At the earliest period of the English law of which we have any definite account, *specific forms* of action were in use, for such cases as had then most frequently occurred. These had been collected into a book called *registrum brevium* or *the register of writs*; and were denominated *brevia formata* or *fixed writs*, being held to be immutable by any authority except that of Parliament; that is, the courts could not change them. Such was the state of things until 1284, when an act was passed, known as the *statute of Westminster 2d*, to provide for the formation of *new writs* in cases for which the register contained no appropriate form, but for which the progress of society made it necessary to provide; and from certain words used in this statute, the new actions formed under it, are called *actions on the case*. (a) Our present actions, then, are traced either to the register of writs, or to the statute of Westminster; and though, judging from their form, they would seem to be adapted only to the redress of a few specific injuries, yet they have been gradually extended in their scope, by means of fictions and innovations, of which the common law has been peculiarly fond, so as to cover all the cases which usually occur. If, however, a case should now arise, for which the precedents thus framed furnish no established form, the question whether there be a remedy or not, is to be determined by the application of this rule:—If the case be *new in principle*, the courts must wait until the legislature provides for it; but if it be only new in the *particular instance*, and comes clearly *within* a settled principle, the courts will entertain a *special action on the case*, founded on the authority of the statute before mentioned. The names of the actions now in use are, *debt, covenant, assumpsit, trespass, trover, detinue, replevin, case, and ejectment*. Of these, the eight first are *personal actions*, and the last *mixed*. The three first, are *actions of contract*, and the other six *actions of tort*. *Assumpsit* and *trover* are in fact *actions on the case*, for they originated under the statute of Westminster; but from their very general use they have become specific designations; while the word *case* has become a generic term, including a large class of actions for which there is no specific designation. I shall now give a very brief description of each of these actions, with refer-

(a) The words of the statute, as early translated, are as follows—"That if it shall fortune in the chancery, that in one case a writ is found, and in *like case* falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and that the cases be written in which they cannot agree, and that they shall refer such cases until the next Parliament; and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants." 1 Chitty on Pleading, 84; 3 Black. 123, 183; 3 Reeve's Hist. E. L. 69; Crabb's Hist. E. L. 290.

ence to the injuries they are designed to remedy, taking them in the above order. The first point which a practising lawyer has to decide, is the proper action for the case presented. To decide this, he must be familiar with the scope and purpose of all the actions; and this is a matter of no small labor and difficulty, on account of the frequent want of correspondence between the original form of a particular action, and the actual purpose for which it is now employed. In describing these actions, I shall have frequent occasion to speak of the *declaration*, which forms a part of the pleadings to be described hereafter. For the present it is sufficient to say that the declaration contains the plaintiff's statement of his case in court. Its form varies in each of the actions, as will appear from the specimens given in the notes. A careful examination of one declaration in each of the actions will best impress upon the memory the distinctive features of such action. In these specimens, I shall omit the caption and conclusion; which are merely formal, and the same in all declarations. I shall also omit the allegations of time and place, which cannot now be conveniently explained.

Debt. (a) The action of debt is one of those which we trace up to the register of writs. It is the remedy *for recovering a debt*, strictly so called, that is a certain and liquidated sum of money, due from the defendant to the plaintiff. It makes no difference whether the debt be evidenced by a sealed contract, a written contract not sealed, an implied contract, or a mere legal obligation without any contract, provided the sum be capable of being reduced to certainty beforehand, and do not depend upon a mere arbitrary estimate of damages by a jury. *Interest* can be recovered in this action, because the amount is rendered certain by the law regulating the rate of interest; but it is in no case adapted to the recovery of uncertain damages. It has, however, been so far extended in modern times, without any alteration of its form, that there are now very few, if any, merely pecuniary claims, which may not be recovered by the action of debt. Thus it may now be brought to recover the *price* of any property sold, or the *compensation* for any service performed, although such price or compensation were not stipulated between the parties; for the amount in such cases is liquidated by proving the market price or customary compensation. But this action has never been extended beyond strictly pecuniary claims, as distinguished from consequential and unliquidated damages. When such, therefore, become the subject of a suit, even though founded on contract, some other action must be resorted to. Originally, the defendant in this action was allowed to *vage his law*; that is, to swear that he did not owe the debt, and procure twelve of his neighbors to swear that they believed him; and this may partially account for

(a) See 1 Swift's Dig. 572; 1 Chit. Plead. 100; Steph. Plead. 14.

its circumscribed scope; but the anomaly of wager of law has never been admitted in this country, and is now obsolete in England. (a)

Covenant. (b) The action of covenant is likewise one of those found in the register of writs. It is the remedy provided for the recovery of damages for the breach of a contract under seal. These contracts, on account of the theoretical solemnity of their execution, which has before been remarked upon, are called *covenants*, by way of eminence; and this action is confined to them only. It makes no difference what the covenant be for; whether to pay money, or to perform or abstain from any other act; if damages can be recovered at all, for the breach of a contract under seal, they may always be recovered by this action. But it is evident that there are many cases in which covenant is a *concurrent remedy* with debt; and the plaintiff may have his option between them. Thus, whenever there is a sealed contract to pay a specific sum of money, this sum with interest, may be recovered as a debt, by the action of debt; or in the shape of damages, by the action of covenant. When however the sealed contract is for any thing else than to pay money, the action of covenant is the sole remedy. It is obviously unnecessary that there should be more than one form of action for the same identical injury; and a perfect system of remedial law would probably avoid concurrent remedies, for the sake of simplicity; but we shall find that under the existing system, most of the injuries for which redress is sought, admit of concurrent remedies by different actions. (c)

Assumpsit. (d) The action of assumpsit has no precedent in

(a) *Declaration in debt.* For that the defendant made his certain writing obligatory of the date aforesaid, sealed with his seal, and now to the court here shown, and then and there delivered the same to the plaintiff, and thereby bound himself to pay to the plaintiff, or his order the sum of ——— dollars, in ——— days after the date thereof, which period has now elapsed. Yet the defendant has not paid the said sum of money or any part thereof to the plaintiff; but still owes the same to, and unjustly detains the same from him.

It will thus be seen that the elements of a declaration in debt are, the fact of indebtedness in a liquidated sum, and the manner of such indebtedness.

(b) See 1 Swift's Dig. 570; 1 Chitty's Plead. 109; Steph. Plead. 76.

(c) *Declaration in covenant.* For that by a certain indenture then and there made between the parties, sealed with their seals and having the date aforesaid, one part of which indenture is now to the court here shown, the plaintiff did lease to the defendant the following property to wit, [describe it], for the term of ——— years, at the annual rent of \$———, payable on the ——— day of ——— in each year; and the defendant, among other things, did thereby covenant with the plaintiff to pay him the said rent, as it should become due; by virtue of which lease the defendant then and there took possession of the said premises for the term aforesaid. And the plaintiff avers that afterwards to wit on ———, a large sum of money, to wit \$——— of the said rent, for ——— years of the said term then elapsed, was and still is in arrears and unpaid; and so the said defendant has broken his said covenant.

It will thus be seen that the elements of a declaration in covenant are, the fact of making a contract under seal, the substance of that contract, and the breach of it.

(d) See 1 Swift's Dig. 574; 1 Chitty's Plead. 88; Steph. Plead. 18.

the register of writs, but originated under the statute of Westminster. It is therefore one of the actions *on the case*; but from its general use, as before observed, it has acquired a generic character. It is the remedy provided for the recovery of damages *for the breach of contract not under seal*. It makes no difference whether the contract be written or verbal, express or implied; or what it be for; whether to pay money, or to perform or abstain from any other act. If the facts be such as to make out a contract, promise, or undertaking, by expression or inference, and there be no seal, *assumpsit* will lie. It takes its name from the Latin word *assumpsit*, originally used when the proceedings were in that language, to describe the undertaking or promise. It will be observed that *assumpsit* can never be a concurrent remedy with covenant, on account of the seal; but it is concurrent with debt, whenever there is an unsealed contract to pay a liquidated sum of money, or a sum capable of being liquidated. It will also be observed, that by taking the seal away from any contract whatever, *assumpsit* will lie upon such contract, instead of covenant. By abolishing seals, therefore, the two actions would be consolidated; and by going one step further, and abolishing the action of debt, which might be readily dispensed with, we should have a simple remedy for all cases of contract. (a)

Trespass. (b) We now come to the *actions of tort*. The action of trespass is found in the register of writs, and was probably the first one reduced to form. The word *trespass* literally includes every kind of transgression or wrong; and hence the action on the case is often described as "*trespass on the case*." But when the word is used by itself, it designates this particular action. It is the remedy made use of to recover damages for *every violent or forcible injury either to the person or property*. Force, therefore, is the *gist* or criterion of the action; and hence the injury is always described in these proceedings as committed *vi et armis et contra pacem, with force and arms, and against the peace*. To judge from this technical language, the action must have originated in those turbulent times, when armed force and violence were so common, that injuries not thus accompanied, were scarcely noticed; but at present the *degree of force* made use of is of no consequence. If one *assault*, that is, make a motion to

(a) *Declaration in assumpsit* For that the defendant was indebted to the plaintiff in the sum of ——— dollars for divers goods, wares and merchandize before that time sold and delivered by the plaintiff to the defendant at his request; and in consideration thereof, the defendant then and there undertook and promised the plaintiff to pay him the said sum of money on request. Yet although often requested, he has not paid the same, or any part thereof, to the plaintiff, but refuses so to do.

From this specimen it will be seen that the elements of a declaration in *assumpsit* are, the fact of making a contract not under seal, the substance of that contract, and the breach of it.

(b) See 1 Swift's Dig. 5, 27; 1 Chitty's Plead. 162; Case v. Mark, 2 Ohio 169; Steph. Plead. 16.

beat another, it is as much a forcible trespass as if there had been an actual *battery*. So if one merely walk upon another's unenclosed grounds, it is as much a forcible trespass, as if he had first broken down a fence, to get in. Perhaps the legal idea of trespass will be best understood, if thus stated:—Every injury to the person or property, which is the direct, immediate, and necessary effect of some act done by the defendant, however great or small the violence used, is viewed by the law as a *forcible injury*, and the proper remedy is *trespass*; from which it follows, that no injury which is the result of negligence or omission, or which is merely the indirect consequence of any act not directly and necessarily injurious, or which is not done by the defendant himself, but by some one for whose acts he is responsible, can be redressed by this action. In fact, it will be found that forcible injuries to the person, and to real property, are almost the only ones for which trespass is the exclusive remedy; since for forcible injuries to personal property, some one or more of the other actions will nearly always lie concurrent with this. The following are specimens of the nice distinctions observed in relation to this action. If a log be put down in the gentlest manner upon my foot, the action is trespass; but if thrown into the street, with whatever violence, and I afterwards fall over it, trespass will not lie. If you pour water directly on my premises, the action is trespass; but if you dam up a watercourse, so as to flood my land, trespass will not lie. If you row your boat directly against mine, the action is trespass; but if the wind or stream urge it against mine, trespass will not lie; and the remedy must be an action on the case. From this description it follows that the injuries redressed by trespass may be divided into three classes. First, direct injuries to the body, where the action is called trespass for an *assault and battery*; secondly, direct injuries to realty, where the action is called trespass *quare clausum fregit*, or trespass for breaking the close, because in legal contemplation every man's land is considered as enclosed; and thirdly, direct injuries to personalty, which may consist either in wrongfully taking and carrying it away, or directly injuring, without taking it, where the action is called trespass *de bonis*. (a)

(a) *Declaration in trespass for assault and battery.* For that the defendant, with force and arms, did assault, beat, bruise, and wound the plaintiff, and other wrongs to him then and there did, against the peace.

Declaration in trespass quare clausum fregit. For that the defendant, with force and arms, broke and entered the close of the plaintiff situate [describe the premises]; and then and there cut down and destroyed a large number, to wit, one hundred oak trees, of great value, to wit, of the value of five hundred dollars; and other wrongs to the plaintiff the defendant then and there did, against the peace.

Declaration in trespass de bonis. For that the defendant, with force and arms, took and carried away the following goods and chattels of the plaintiff, to wit, ten bales of cotton, of great value, to wit, of the value of ——— dollars, and other wrongs to the plaintiff the defendant then and there did against the peace.

From these examples it will be seen that the elements of a declaration in trespass

Trover. (a) The action of trover, as we have seen, originated under the statute of Westminster. It takes its name from the French word *trouver*, signifying *to find*. It was originally designed as the remedy for recovering damages *whenever personal property had been literally lost by the plaintiff, and found and made use of by the defendant*. It was one of the actions on the case; but it has passed into such extensive use, as to acquire, like *assumpsit*, a generic character. By a resort to fiction, its sphere has been so much enlarged in the progress of time, that it now extends to all cases where the personal property of one person has been wrongfully *converted* by another to his own use. The word *conversion*, in this action, has a technical signification. It implies either a *wrongful taking* of the goods of another; or a *wrongful detention* of what may have been rightfully taken; or a *wrongful using* of what may have been neither wrongfully taken or detained. Whenever one commits either of these three acts, with respect to personal property belonging to another, he is guilty of what the laws calls a *conversion* of such property to his own use, and trover lies to recover damages. Conversion, as thus explained, is the gist or criterion of the action; although, for the sake of adhering to the original form, the property is still alleged, by way of fiction, to have been *lost* by the plaintiff, and *found and converted* by the defendant. It follows, therefore, that trover is concurrent with trespass in all cases of *wrongful taking*. We shall also find that trover is concurrent with detinue and replevin, in all cases of *wrongful detention*. The following are specimens of the nice distinctions which prevail in regard to this action. If my trees have been cut down, but not carried away, trespass is the only remedy, because growing trees form part of the realty; but if they have been carried away, trover or trespass will lie concurrently, because after being severed, they are personalty. If coals have been dug from my pit, but not thrown out upon the surface, trespass is the only remedy; but if thrown out, trover or trespass will lie, for the same reason as before. (b)

Detinue. (c) The action of detinue is one of the original ac-

are, the fact of committing a trespass, the fiction that it was done with force and arms, and against the peace, and the particulars of the trespass.

(a) See 1 Swift's Dig. 533; 1 Chitty's Plead. 147; Steph. Plead. 18.

(b) *Declaration in trover.* For that the plaintiff was lawfully possessed, as of his own property, of certain goods and chattels, to wit, [describe the goods generally, as ten chairs, ten horses], of great value, to wit, of the value of \$——; and afterwards on the same day, the plaintiff lost the same; and afterwards on the same day, the same came into the possession of the defendant by finding; yet the defendant, well knowing the same to belong to the plaintiff, but intending to injure and defraud him thereof, refused to deliver the same to the plaintiff, though often requested so to do, and then and there converted the same to his own use.

It will thus be seen that the elements of a declaration in trover are, the fact that the plaintiff owned the goods, the fiction that he lost, and the defendant found them, and the fact that the defendant converted them to his own use.

(c) See 1 Chitty's Plead. 117; Steph. Plead. 18.

tions found in the register of writs. It is recognized in this state, but seldom resorted to, on account of the extension we have given to the action of replevin. It is the remedy originally provided for *recovering specific personal property wrongfully detained from the rightful owner, together with damages for the detention*. It is the only action, except replevin, adapted to this purpose; all the others being to recover damages alone. Besides the thing itself, damages may be recovered for the detention, and may include the value of the thing itself, when it cannot be had. No matter how the defendant came by the article, provided the plaintiff has a right to it; for the wrongful detention is the gist or criterion of the action. It follows from the very nature of the recovery, that the action can only be used, where the detained article can be specifically identified. It also follows that detinue may be concurrent with trespass, trover and replevin; for a wrongful detention is the sole gist of replevin, and is one of the gists of trover; and where goods have been wrongfully taken, the plaintiff may waive the taking, which would be the gist of trespass, and proceed for the detention only. (a)

Replevin. (b) The action of replevin, at common law, was the remedy for *the recovery of specific personal property wrongfully distrained, together with damages for the wrongful act*. To distress, is to seize upon property for payment of rent, taxes, and the like. The act of distressing, as well as the thing taken, is called a *distress*; and the object of the action was to try the legality of the distress. But the summary method of compelling payment by distress, is not practised here, except in collecting taxes and canal tolls; and therefore, if the scope of the action had not been greatly enlarged, it would have been of little use. But by our statute, it is made a much more general remedy. It now lies *whenever personal property is wrongfully detained from the owner*; or in other words, a wrongful detention is now made the gist of replevin. The object of the action is twofold; to recover the specific property detained, and damages for the detention. In these respects, it coincides entirely with detinue; but in the mode of proceeding it is entirely different from any other action, and forms an anomaly in our practice. The plaintiff makes affidavit that the property belongs to him; that it is wrongfully detained by the defendant; and that it was not taken on any process

(a) *Declaration in detinue.* For that the defendant was possessed of certain goods and chattels of the plaintiff, to wit [describe them], of great value, to wit, of the value of _____ dollars, to be delivered to the plaintiff when the defendant should be thereto requested; yet though often requested, the defendant has not delivered the same or any part thereof to the plaintiff, but still wrongfully detains the same.

It will thus be seen that the elements of a declaration in detinue are, the fact that the plaintiff has a right to the possession of the goods, and that the defendant wrongfully detains them. The fiction of a bailment is commonly made use of, as in the above form, but is believed not to be essential.

(b) See 1 Swift's Dig. 522; 1 Chitty's Plead. 157; Steph. Plead. 19.

against the plaintiff, nor for any debt or tax due the state; and thereupon the sheriff *replevies* the property; that is, he takes it out of the hands of the defendant, and delivers it to the plaintiff, upon his giving *security* to try his title, and abide the event of the suit; which security must be in double the value of the property, ascertained by *appraisement*, for which the statute provides. The suit then goes on to trial; and if the plaintiff fails in proving his title, he is answerable to the defendant for the value of the property replevied, and damages for taking it away; but the defendant cannot recover back the specific goods. If the plaintiff succeeds, he already has the property, and of course only recovers damages for the previous detention, while in the hands of the defendant. From this view of replevin as it exists here, you will observe that it may be concurrent with trespass, trover, and detinue, as before explained in speaking of detinue. But in general the choice will lie between trover and replevin. If you wish to recover the specific chattels, and can find and identify them, you will bring replevin; but if you cannot identify them, or cannot come at them, or do not want them, you will bring trover for the damages you have sustained. (*a*)

Case. (b) The action on the case originated, as we have seen, under the statute of Westminster 2d, and took its name from words used in that statute. It stands for a *genus*, of which *assumpsit* and *trover* were *species*. We sometimes say, "*trespass on the case*," but the single word "*case*" is sufficiently definite. Case is then the remedy provided for the recovery of damages *for any injury to the person, property, health, reputation, or domestic comfort of individuals, not accompanied by force, either actual or constructive*. Whenever the matter affected is not tangible, as reputation, so that force cannot be applied to it; or whenever the injury complained of is not immediate but consequential, or is the result of negligence or omission, this action will lie. Of course it embraces a much greater variety of injuries than any other action. It is in fact what the statute of Westminster intended it to be, a general remedy for all civil injuries, not before provided for by the established forms in the register. Case is often rendered concurrent with covenant and *assumpsit*, by waiving the contract, and proceeding for the negligence or *tort*. It may also in some cases be rendered concurrent with trespass or trover, by waiving the force or conversion, and proceeding for *negligence* in not returning or taking care of chattels.

(*a*) *Declaration in replevin*. For that the defendant was possessed of certain goods and chattels of the plaintiff, to wit [describe them], to be delivered to the plaintiff when the defendant should be thereto requested; yet the defendant, though often requested, would not deliver the same or any part thereof to the plaintiff, but wrongfully detained the same until replevied.

Thus the declaration in replevin is nearly identical with that in detinue.

(*b*) See 1 Swift's Dig. 539; 1 Chitty's Plead. 133; Steph. Plead. 17.

In fact, all these actions are in their nature separated by such minute shades of difference, and their original boundaries have been so often enlarged for the furtherance of justice, which was too much hampered by the ancient forms, that the most accomplished practitioner is often at a loss which one of two or more actions he ought to adopt. (a)

Ejectment. (b) The action of ejectment is the remedy now used for recovering the possession of real property. In Ohio, (c) and several other states, it is the only action employed for this purpose, having silently taken the place of all *real actions*, strictly so called. Ejectment was not originally designed for trying the title to land; but has been adapted to this object by means of a series of fictions. In arriving at its present state, it has passed through three distinct stages. At first, it was only used by the lessee of land, who had been ejected or ousted therefrom by a stranger, to recover damages for the ouster. We have seen that in early times a lessee for years had no security for the permanence of his title. As against the lessor, if there was no covenant for quiet enjoyment, the lessee was without remedy; for the lessor could not be treated as a trespasser. But if the ejector was a stranger, the lessee might sue him for the ejectment in an action of trespass, and recover damages, but not possession of the land. In process of time however the courts of chancery undertook to compel the ejector, unless he could justify the ejectment under a superior title, to make restitution of the land to the lessee. In this the courts of law soon followed them, though without altering the form of the action. The next stage therefore was to enlarge its scope, so as to enable the lessee to recover possession of the land for the unexpired term, as well as damages for the ouster. But for this purpose it was necessary to show a better title than the ejector, which incidentally brought up for examination the *title of the lessor*, since the lessee could have no other title than that derived from him. In this state of things, it was perceived by the lawyers, that by recourse to several fictions, the trial of the lessor's title might be made the direct and main object of the action, instead of being an incidental circumstance. For

(a) *Declaration in case.* For that whereas the plaintiff has always sustained a fair reputation for honesty, and has never been guilty or suspected of the crime of larceny; yet the defendant, well knowing this, but maliciously intending to injure the reputation of the plaintiff, and expose him to the penalties of the law for larceny, did utter and publish, in the hearing of sundry persons, of and concerning the plaintiff, the following false and scandalous words, to wit: You [meaning the plaintiff] are a thief, and I [meaning the defendant] can prove it; by means whereof the plaintiff is greatly injured in his reputation, and has been rendered liable to a prosecution for larceny.

The above is but a single example of a declaration in case for slanderous words. No general form can be given; for, from the very nature of the action, the declaration must vary with each particular case.

(b) See 1 Swift's Dig. 504; 1 Chitty's Plead. 188; Steph. Plead. 11; 3 Black. 199; Adams on Ejectment, with notes by Tillinghast; Runninton on Ejectment,

(c) Holt's Lessee v. Hemphill, 3 Ohio, 232.

this purpose, there were only wanting a fictitious lessee, a fictitious ejector, and a fictitious ouster; and for the sake of getting rid of the almost endless technicalities and subtleties of real actions, the courts readily sanctioned the introduction of these fictions, which have now been acquiesced in for more than three centuries; and the result is, that if I claim title to a piece of land of which you are in possession, I begin by serving upon you a *declaration* and *notice*, which in this action takes the place of a writ. The declaration states that I made a lease or devise to a fictitious person, say John Doe; that he entered into possession; and that another fictitious person, say Richard Roe, forcibly ejected or ousted him from the premises. Thus John Doe becomes the nominal plaintiff, and Richard Roe the nominal defendant. But appended to this declaration is a notice, purporting to be written by Richard Roe to you, informing you that he has been sued, but that being a *casual ejector* only he shall not defend, and advising you to appear and defend. This the court will permit you to do, by entering into a *consent rule*, by which you confess the fictions of a *lease*, *entry*, and *ouster*, as alleged in the declaration, and agree to try the question of title only. Such is the circuitous manner in which one of the most important actions is made to effect its purpose. The form still remains that of trespass to recover damages for the ouster; but these damages are now merely nominal. You cannot even recover, in this action, the intermediate profits of the land, while the defendant has been in the unlawful possession of it; but must bring a separate action of *trespass for mesne profits*. Nor is a final judgment in ejectment conclusive of the controversy, as it is in other cases. Ordinarily a final judgment is conclusive between the same parties, in relation to the same matter. But in ejectment, the parties, being fictitious, may be changed at will, and the same matter litigated again, until a court of chancery should interfere by injunction. While therefore much has been gained by thus superseding real actions, a still further improvement would be to abolish these fictions, and so shape the action as to recover not only possession, but mesne profits. (a)

(a) *Declaration in ejectment.* For that one ——— [the lessor and real plaintiff] had demised to John Doe the following real estate situated in said county, to wit, [describe the land,] together with the appurtenances, for the term of ——— years from the date aforesaid, which is not yet expired; by virtue of which demise the said John Doe entered into possession thereof for the said term; and Richard Roe afterwards, to wit, on ———, at the county aforesaid, with force and arms entered into the said demised premises, and ejected the said John Doe therefrom, and other wrongs to him then and there did, against the peace.

Notice. To ——— [the person in possession and real defendant.] Sir: I am informed that you are in possession of, or claim title to the premises in the above declaration mentioned, or some part thereof; and I, being sued in this action as casual ejector only, and having no claim to the said premises, do advise you to appear at the next term of the [describe the court,] to be holden in said county on the ———, by some

§ 209. *Analysis of wrongs and remedies.* I have thus glanced at the various actions, by which civil remedies are administered. Perhaps you will now be tempted to inquire what necessity there is for such a variety? Why one action of contract would not answer all the purposes of three? Why the five actions of *tort*, might not be reduced to two; namely, one for the recovery of the specific thing, and the other for the recovery of damages for injury or detention? And why the action of ejectment would not be equally efficient and still more conclusive, when divested of its circuitous and fictitious character? It might be difficult to satisfy a philosophic mind that all these changes would not be improvements. If the forms of civil redress were now for the first time to be prescribed, and the task were committed to capable men, it is not probable they would much resemble those in present use; because no analysis, either of contracts or torts, would produce such a result. If each minute difference were to require a peculiar form, the number would be infinitely greater. If not, there would be no reason for making it so great. But these forms have come down to us through the lapse of centuries; and by the various contrivances before alluded to, they have been gradually moulded and extended so as to meet the increasing wants of civilization; and the true question now is, whether a reform be on the whole expedient? No doubt this part of the law is susceptible of great simplification; and it is equally clear that a consolidation of the forms of action would render litigation much less expensive. It would likewise go far to exculpate the remedial part of the law from the charge of unnecessary intricacy and technicality. The number of cases decided upon mere questions of form, would be vastly diminished. Fictions would no longer occupy the place they now so unworthily hold in the administration of justice, and common law would approximate more nearly to the common sense of mankind. But would these advantages compensate for the evil always attendant upon any radical reform in jurisprudence? Upon this grave question the inexperienced may well hesitate; for it now divides the best opinions of the age. But one can hardly help wishing that the experiment might be made; for as the system now exists, it probably takes more time to become familiar with the forms of law, than to comprehend its abstract principles. Should these suggestions have no other effect, I trust they will stimulate your curiosity to examine the more carefully whether

attorney of said court, and by a rule of said court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment by default, and you will be turned out of possession.

Consent rule and plea. The defendant comes and confesses the lease, entry, and ouster in the declaration mentioned, and admits himself to be in possession of the premises therein described, and says that he is not guilty of the trespass and ejectment complained of.

the evils alluded to, really exist. In the mean time, before describing the proceedings in these actions, I shall give a brief analysis of the wrongs they are designed to redress, with a view to impress the scope and purpose of each, more deeply on the memory. We have before seen that all wrongs have relation either to the person or property, and that those of a more atrocious character than ordinary, are punished as crimes; but the present inquiry will be confined to civil injuries.

Wrongs relating to the person. These are either to the body, liberty, health, reputation, or domestic comfort of individuals. 1. If one unlawfully *threaten* me with bodily harm so as to interrupt my business, I may sue him in *trespass*, and recover damages for such interruption, although mere threats, which do not interrupt business, furnish no cause of action. Here then the interruption is the injury, and must be specially counted upon under what is called a *per quod*, or special allegation. Again, if one unlawfully *assault* me, that is, attempt or offer to beat me, though my business be not interrupted, I may sue him in *trespass*, and recover damages for the assault merely; for here is something more than mere threats. Again, if one unlawfully *beat* me, I may sue him in trespass and recover damages for such battery. Every battery of course includes an assault, and hence this injury is commonly called an *assault and battery*. The degree of violence is of no further consequence than to enhance or reduce the damages; for if one barely touch me unlawfully, it is a battery; and it is no more than a battery, if he wound, maim, or otherwise hurt me, to the very verge of taking life. But the damages to be recovered will be in proportion to the injury; and very exemplary or vindictive damages are often recovered, under the name of *smart money*. I am of course supposing that there is no justification for the wrong thus done. For the law permits a parent, master, guardian, or teacher, in reason and moderation, to correct his child, apprentice, ward, or pupil, without becoming a trespasser. So one may defend himself, his property, wife, child, ward, servant, or pupil, against an unlawful attack, if he use no unnecessary violence, without becoming a trespasser. Here the defence is termed *son assault demesne*, meaning that the plaintiff made the first assault. 2. The only wrong to one's *liberty*, is the unlawfully depriving him of it; and it makes no difference, whether this be done by confining him in prison or in a private house, or by forcibly detaining him any where else. The injury thus done is termed a *false imprisonment*, and the remedy is by an action of trespass, because in any unlawful detention of another the law presumes force. Nor is the time or manner of the detention material, except to increase or diminish the amount of damages, which are often very great. In addition to this, we have before seen that a speedy restoration to liberty may be had through the writ of *habeas corpus*; so that the remedy for this

great wrong is theoretically complete. 3. The *health* of individuals may be injured, without any direct personal violence, by the mal-practice of physicians, or by nuisances; and the remedy for such injury, is by an action on the *case*. Here too, on account of the exceeding value of the subject injured, the damages are often very great. 4. The *character* of a man strictly signifies what he is in himself, independently of the opinion others may entertain of him. When therefore we speak of defamation of character, we use terms inaccurately. But the *reputation* of a man depends wholly upon the estimation in which others hold him, and may therefore be injured by defamation. The remedy for such injury is by an action on the *case*, because the thing affected being intangible, cannot be the subject of direct violence. *Slander* may be either spoken or written. In the latter case it is called a *libel*. In either case, the words must be both false and malicious, in order to constitute a civil injury; though falsehood is not essential to a criminal libel, unless it concern public men or measures; and even where the words are false, the absence of malice, which here means an intention to injure, will be a good defence. The law makes an important distinction between words which are actionable in themselves, and those which only become actionable by alleging and proving some special damage. Words actionable in themselves, and requiring no proof of special damage, are those which charge another with any thing criminal, or which would exclude him from society, or which would injure him in his business. Any other words require proof of actual damage under a *per quod*, because the law does not presume it. A libel may consist of words only, or of signs, pictures, caricatures and the like; and on account of the more permanent nature of the injury, many words would be actionable in themselves when published, which would not be so when merely spoken. To make libellous matter actionable, it seems only necessary that it should bring one into public hatred, contempt or ridicule. The only remaining injury to the reputation is that which results from a *malicious prosecution*, which may be either a civil or criminal prosecution. To support the action for this injury, there must be *malice*, either express or implied, *want of probable cause* for the prosecution, and an injury to the defendant, either in his liberty by the imprisonment, in his reputation by the disgrace, or in his property by the expense. The remedy is by an action on the *case*. 5. The *domestic comfort* of individuals may be affected by the following injuries, for which the law affords a remedy. *First*, a husband may maintain trespass for the abduction of his wife, whether forcibly or by persuasion. So he may maintain trespass for the battery of his wife, whereby he loses her society for a time. So he may maintain trespass for adultery with his wife. In the cases of abduction and adultery the action is trespass, because the wife cannot, in the eye of the

law, give her consent. In the case of battery, the husband and wife must join in the action, unless where he proceeds under a *per quod* for the special injury he sustains by loss of her society. The old expression was *per quod consortium amisit*. Secondly, a parent may maintain trespass, and perhaps case, for seducing and debauching his daughter. But so little does the law profess to regard wounded feelings as a cause of action, that in this case the damage must be laid under a *per quod* for the loss of service, *per quod servitium amisit*. The slightest proof of service however will be sufficient to maintain the action, and then the jury may give damages to any extent they see proper for wounded feelings. The same doctrine has been held in regard to an adopted daughter, and even a niece. And it would seem that on the ground of loss of service, a parent might maintain trespass for the battery of his child, or *case*, for enticing the child away. Thirdly, a master has a similar remedy for seducing, beating or enticing away his apprentice or servant; except that he can have no damages for wounded feelings. But it would seem that a guardian could have no such remedy with respect to his ward, unless the relation of master and servant existed.

Wrongs relating to property. These may be considered first with reference to real property, and secondly, with reference to personal property. All wrongs to *real property* must consist in detaining the possession from him who is entitled thereto, or doing some injury to the property without detaining the possession.

1. Real actions not being in use here, the general remedy, where possession of land is unlawfully withheld, is *ejectment*, which may be maintained against the person wrongfully in possession, by any one who has a legal right to such possession. But for certain cases requiring a more speedy remedy, as where one unlawfully and forcibly enters and detains the premises of another, or having lawfully entered, unlawfully and forcibly detains the same, a more summary remedy has been provided in this state, by an action for *forcible entry and detainer*, to be tried before a justice of the peace, by a jury of six persons. At common law, this forcible entry and detainer was an indictable offence, but is not so here. In addition to these general remedies, there are proceedings in dower and partition, as will be seen hereafter, adapted to those particular claims; and a court of chancery will often enable one to recover possession of land when there is no remedy at law.
2. For injuries done to real property without detaining the possession, the general rule is, that if the injuries be forcible, the remedy is *trespass*, if not, *case*; these being the only actions which can be maintained for such injuries. The theory of the law is, that the land of every person is enclosed and set apart from that of his neighbor, either by a visible and tangible fence, or by an ideal and invisible boundary; and therefore every unwarrantable entry upon the land of another is deemed a forcible breaking of his close,

and the remedy is by an action of *trespass quare clausum fregit*. In order to maintain this action, the plaintiff must at the time have the actual possession of the land, which alone will be sufficient against a mere intruder. But if the defendant entered under color of title, then the plaintiff must show a legal right of possession. This is regarded as merely a possessory action; and therefore a person entitled to the emblements or vesture of land, may maintain trespass even against the owner of the land, who forcibly prevents him from taking them away. We have seen that in ejectment the damages are merely nominal, the main object of the action being to recover possession. If therefore the plaintiff would recover damages for the wrongful detention of the land, or in other words, the intermediate profits during the period of wrongful possession, he must bring a separate action, which is termed *trespass for mesne profits*. Of the injuries to land not accompanied by force, one of the most frequent is that of *waste*, which we have seen to be, where the tenant for life or years does some permanent injury to the inheritance, with respect to the buildings, timber or soil; and the remedy is by action on the *case*, because the wrong-doer is rightfully in possession. Another injury is *slander of title*, which is redressed by an action on the *case*. But there is rarely occasion for such remedy now, because the goodness or badness of title is readily ascertained by searching the records, and therefore the most false and malicious assertions respecting it can do very little harm. The remaining injuries to land may be classed under the general head of *nuisances*, the remedy for which, besides abatement of the nuisance, is an action on the *case*. The most important of these nuisances are, overhanging another's dwelling so as to throw the water upon his roof; obstructing another's ancient lights, that is, lights enjoyed for twenty years or more; corrupting the atmosphere with noisome smells, so as to render another's residence unhealthful or uncomfortable, and overflowing another's land by diverting or interrupting established water-courses. This part of our law relating to realty furnishes a strong contrast to the corresponding portion of the English law, in respect to its simplicity. Blackstone devotes to it seven chapters, replete with technical learning about *abatement, intrusion, disseizin, discontinuance, deforcement, subtraction, and disturbance*, with all of which we may dispense entirely, unless we choose to study it as matter of curiosity.

Wrongs to personal property may be considered, first, with reference to things in possession, and secondly, with reference to things in action. First, *things in possession* are liable to two kinds of injuries, namely, wrongful deprivation of possession, and abuse without deprivation of possession; with respect to which the following general rules may be laid down. 1. If goods be wrongfully taken from my possession, whether I be the absolute

owner or only entitled to the temporary possession thereof, I may bring *trespass de bonis asportatis*, for such wrongful taking; or waiving the wrongful taking, I may bring *trover* for the wrongful detention; or, if I would recover the specific goods, rather than their value, together with damages for the detention, I may bring *detinue* or *replevin*. 2. If the original taking were rightful, and the detention only is wrongful, I cannot bring *trespass*, but must choose between *trover*, *detinue*, and *replevin*. 3. If goods be forcibly injured while in my rightful possession, I may bring *trespass*, and perhaps, waiving the force, I may bring *case*, but this is doubtful. 4. If goods in my rightful possession be injured through the neglect or misconduct of another, without force, my only remedy is *case*; for *trover*, *detinue*, and *replevin* presuppose a wrongful possession in the defendant. 5. If my goods, rightfully in the temporary possession of another, be injured in any way not amounting to a *conversion*, whether by force, neglect, or misconduct, my only remedy is an action on the *case*.

Secondly, *things in action*, consisting of contracts and legal obligations, are liable only to one kind of injury, namely, non-performance; but the nature of the remedy varies according to the nature of the obligation; respecting which the following rules may be laid down. 1. If a debt, technically so called, be due me, that is, a sum of money already liquidated, or capable of being liquidated with certainty, whether it be a statutory penalty, or a voluntary indebtedness by contract under seal, or in writing without seal, or simply implied by law, I may bring the action of *debt*. 2. If this liquidated sum be evidenced by a contract under seal, I have an option between *debt* and *covenant*; and if by a contract not under seal, whether express or implied, I have an option between *debt* and *assumpsit*. 3. If there be a contract for any thing else than a liquidated sum of money, and it be under seal, the only remedy is *covenant*; and if not under seal, the only remedy is *assumpsit*.

§ 210. *Process.* (a) The preceding remarks have prepared the student to answer the first question of practice, namely, what is the proper action to be brought? The next inquiry is, how is such action to be commenced and prosecuted? Judicial proceedings naturally divide themselves into five parts. 1. The *process*, including the means whereby the parties are brought before the court. 2. The *pleadings*, including the means of making up an issue between the parties. 3. The *trial*, including what relates

(a) With respect to the federal courts, the act of Congress of 1798 adopted the state laws in regard to process as they existed in 1789. The act of 1828 adopts the state laws, in regard to final process both in law and equity, as they then existed; but provides that the federal courts may by rules conform such process to the alterations since made by state laws. See *Bronson v. Kinzie*, 1 Howard 311; *Duncan v. Darst*, ib. 301.

to jurors and witnesses. 4. The *judgment*, including what relates to appeals and writs of error. 5. The *execution*, including the means of carrying the judgment into effect. I am to speak first, then, of *process*, a term which embraces all writs and orders issued by courts to their executive officers in the course of judicial proceedings. In England, where the king is in theory the fountain of justice, the first step in any civil action is to obtain an *original writ*, (a) which is a mandatory letter in the king's name and under the great seal, issuing out of the court of chancery and commanding the defendant to satisfy the plaintiff, or else appear in the proper court and answer for his default. This writ is there deemed necessary to give the courts of law jurisdiction. In modern practice, however, it is usually dispensed with by recourse to a fiction, and a proceeding by bill substituted. But in this country there is no occasion for an original writ, and nothing in the nature of a proceeding by bill. Our courts derive their jurisdiction from the constitution, and require no writ to confer it in particular cases. Accordingly all process is here divided into *mesne* and *final*; the former signifying all process before judgment, and the latter all process after judgment. The constitution requires all process to issue in the name of the state; but it issues under the seal of the proper court, and is attested by the clerk. As a general rule, all courts are invested with power to enforce obedience to any process they are authorized to issue. We have express provision to this effect, though the power would exist incidentally. Disobedience is technically denominated a *contempt*, and may be punished by attachment, fine, imprisonment, and sometimes sequestration of property. Moreover the officer who is charged with executing any process may call to his aid the *posse comitatus*, or power of the county; and it is made the duty of every person to render assistance when called upon, under penalties for refusal. Even the military force of the country may be called out, if necessary. The theory is that every writ, properly issued, must be obeyed at all hazards.

Precipe. The first step, then, is to procure the proper writ to be issued. This is done by delivering to the clerk a *precipe*, which is a brief written order to him to issue the writ required. It may be made by the plaintiff or his attorney, but usually by the latter. It names the court, the parties, the action, the writ, and the damages, in all which respects the writ and pleadings must correspond with the *precipe*. The only action, in which no *precipe* is required, is ejectment, where a copy of the declaration and notice takes the place of a writ. Upon filing the *precipe*, it is the duty of the clerk to obey it in a reasonable time; and if he fail to do so, he is liable in damages on his official bond. The only part of the *precipe* which is entirely discretionary is the *damages*, as

(a) Steph. on Plead. 5.

to which the rule is to lay them high enough, to cover all that can by possibility be recovered; since you cannot recover more than you claim, though you may less. If the writ required be a *capias*, *attachment* or *replevin*, which, by the law of this state, do not issue as a matter of course, at the mere suggestion of the plaintiff, but only when certain facts exist, which are specified in the statute, these facts authorizing the writ must be evidenced by *affidavit* of the plaintiff, his agent, or attorney. An affidavit is a written oath or affirmation, subscribed by the party making it, and certified by some officer qualified to administer oaths. In these cases the affidavit must accompany the *precipe*. In describing the parties to the writ, their additions, occupations, or titles need not be stated. If they have a middle name, the initial letter only need be used; but otherwise the full name. In describing partners, the individual names are first stated, and then the partnership name. In describing a corporation, care must be taken to use the exact name mentioned in the charter, since it can only be known by that name. The cause of action must be substantially set forth in the *precipe*, so that the clerk may indorse it on the writ; otherwise the court will on motion quash the writ at the costs of the plaintiff. The writs by which an action is ordinarily commenced are *summons*, *capias*, *attachment*, and *replevin*. But before considering these I will briefly describe the writs of *scire facias*, *habeas corpus*, *mandamus*, and *quo warranto*, which are resorted to on particular occasions. (a)

Scire facias. (b) This is the name of a writ founded upon some matter of record, as a judgment or recognizance; its purpose being to notify the party against whom it issues, to show cause why some step founded upon such record, should not be taken against him. In this state the cases in which it may be issued are pointed out by statute; and it is sometimes in the nature of a new action, but more generally a consummation of some former action. The cases in which it may be here issued are as follows. 1. To make joint defendants, who were not served with process originally, parties to a judgment already recovered against their co-defendants. 2. To obtain further damages on a penal bond, after an original judgment for the whole penalty, in consequence of new breaches of the condition of such bond after such original judgment. 3. To revive a judgment in favor of the executor or administrator of a deceased plaintiff, or against the executor or

(a) *Precipe*. A. B. } Court of _____
 v. } Action of _____
 C. D. } Damages _____ dollars.

The clerk of the court of _____ for _____ county, Ohio, will issue a writ of _____ returnable _____, and indorse that suit is brought to [describe briefly the cause of action.] [Date.] E. F. Atty. for Plff.

(b) 6 Dane's Abr. 462; Wilcox's Forms, 231; Wolf v. Ponnssford, 4 Ohio, 397.

administrator of a deceased defendant, when the plaintiff or defendant has died after judgment; for if the death took place before judgment, they are made parties to the suit by citation. 4. To revive a dormant judgment, that is, a judgment on which no execution has been issued for five years. 5. To make the sureties of a sheriff parties to a judgment of amercement against him for neglect of duty. 6. To subject real estate to the satisfaction of a judgment rendered by a justice of the peace, when there is no personal property to satisfy such judgment. 7. To obtain satisfaction for any injury arising from the neglect of duty of any executor, administrator, or other officer, after judgment has been recovered on his official bond, in favor of some other person. 8. To compel special bail to satisfy the judgment recovered against their principal. 9. To obtain satisfaction of a judgment against the principal, in favor of bail, who have been compelled to pay such judgment. In all these cases the writ of *scire facias* recites the facts which authorize it to be issued, and then commands the sheriff to make known to the party, against whom it issues, that he appear in court and show cause, if any there be, why the contemplated step should not be taken against him. If he can be found, the sheriff serves him with a copy of the writ, and returns *scire feci*; if not found, the sheriff returns *nihil*; and in proceedings against special bail, two returns of *nihil* are held equivalent to service. All proceedings by *scire facias* have this peculiarity, that the writ itself operates as a declaration, and may be pleaded or demurred to, as will be explained hereafter.

Habeas corpus. The nature of this writ has already been described. We have seen that it is the great writ of liberty; and that it may be issued in favor of any person unlawfully detained in the custody of another, whether under color of legal process, or the right of a parent, master, or guardian, or any other pretext whatsoever. Application may be made in writing, by the person imprisoned, or any other person in his behalf, to either of the courts in term-time, or any judge thereof in vacation. If the cause of detention be legal process, it must be set forth in the application. If not, the truth of the application must be evidenced by affidavit. If the court or judge allow the writ, such allowance is endorsed on the application, and the time is fixed for the return of the writ. The writ is addressed to the person holding the applicant in custody, and directs him to have the body of the applicant, together with the cause of detention, before the court or judge at the time specified. Any disinterested person may serve the writ, by delivering it to the person to whom it is addressed, and retaining a copy to proceed upon in case of default. The writ is returned by bringing the person detained before the court, and setting forth the cause of detention in writing. The court or judge then examines into the cause of detention, and either re-

mands the person back into custody, or discharges him, or holds him to bail, as the facts of the case may warrant. (a)

Mandamus. At common law this was a prerogative writ, and not a writ of right. In this state it is provided for by statute. It issues only from the supreme court. Its object is to compel the performance of some public duty, by some public person, when there is no other specific legal remedy. It may be addressed to any public officer, corporation or inferior court, requiring them to do some specific legal act, agreeably to law. It presupposes a neglect of duty, and never issues for a mere lack of discretion. Its most common purpose is to enforce the admission of a person to an office to which he has been legally elected; or his restoration to an office from which he has been illegally removed. It issues at the instance of the party injured, upon proper shewing made to the court, and not as a matter of course. On application for a mandamus, the first step is to issue an alternative mandamus, reciting the facts making out the delinquency, and commanding the delinquent to do the thing required, or show cause for the omission. This is sometimes called a *rule to show cause* why a mandamus should not issue; and the court will hear argument in opposition to this application. If the rule be granted, and the delinquent on being served, refuse to make any return, he is in contempt, and may be proceeded against by attachment. If return be made, and the cause shown be not sufficient, it may be demurred to. If not true, it may be pleaded to and the issue tried by a jury. If the verdict be against the delinquent, instead of sending the injured party to his action upon the false return, as was the common law rule, the court will render judgment for the damages and costs. And in addition thereto, whenever the judgment is against the delinquent, a peremptory mandamus will be ordered forthwith. If the delinquent refuse obedience, he is fined at the discretion of the court. (b)

Quo warranto. This is the name of a writ which, at common law, might be issued against persons or corporations claiming to exercise any office or franchise, for the purpose of inquiring into their authority, and ousting them from such office or franchise, in

(a) *Writ of habeas corpus.* The state of ———, county of ———. To ——— [the person detaining the applicant]. We command you that you have the body of ———, said to be detained in your custody, together with the cause of his detention, before [the court or judge], at ———, on the ——— [name the day and hour], to abide such order as shall then and there be made in this behalf: and have you then and there this writ with your doings thereon. Given under the seal of said court this [date]. Attest ———, clerk. [Seal of court].

The return may be as follows:—I have the body of the said ——— before the [court or judge], pursuant to the within order; and do certify that the said ——— was by me taken into custody on the ———, and is now detained by virtue of [here set forth the authority for detention]. [Date and signature.]

(b) The law regulating proceedings of this kind is very fully discussed in the case of *Marbury v. Madison*, 1 Cranch, 137.

case no authority should be shown. But in modern practice an *information*, in the nature of a quo warranto, is most frequently resorted to; and such is the practice in this state, as regulated by statute. This information is filed on leave granted by the supreme court in term-time or one of the judges in vacation, by the prosecuting attorney, either on his own relation or that of any individual, or when directed by the governor, general assembly, or supreme court. When the relation is made by an individual, it must be evidenced by his affidavit. The cases provided for are as follows. 1. When any person shall usurp any public office civil or military, or any franchise, or any office in a private corporation. 2. When any civil or military officer shall have done or suffered any act which works a forfeiture of his office. 3. When any association of persons shall assume to act as a corporation without being incorporated. 4. When any corporation shall have violated its charter, or forfeited it by non-user, or done any act amounting to a surrender, or misused or usurped any franchise. The information sets forth specifically the facts which form the predicate of the proceeding, and is in the nature of a declaration. On motion for leave to file it, the court may order notice to be given to the opposite party, and hear argument in opposition. When the information has been filed, a summons issues, which is served and returned as in other cases. The defendant may then demur or plead to the information, and the issue is tried as will be described hereafter. When the complaint is for usurping an office claimed by other persons, their claims are set forth in the information, and the judgment will embrace an ouster of the usurper, and an admission of the rightful claimant. The latter may also bring his action on the case for damages against the former, at any time within one year after the judgment. When the proceeding is against a corporation to enforce a forfeiture, it must be commenced within five years. Upon judgment of forfeiture, trustees are appointed to wind up its concerns; and an action on the case for damages may be brought against the officers of the corporation, by any person injured, at any time within three years from the judgment. When the proceeding is for usurping a franchise not granted by the charter, it must be commenced within twenty years, and in this case the judgment is that of ouster only. Obedience is enforced, as in other cases, by an attachment for contempt.

Summons. This is the name of a writ, *commanding the sheriff to summon the defendant to appear in court on a given day, and answer to the charge of the plaintiff.* If issued in term-time, it is made *returnable* forthwith. If in vacation, it is made returnable to the beginning of the next term. That is, the defendant is notified to appear forthwith, or at the next term, as the case may be. This is in pursuance of the rule, that all process must be returned to the court whence it issued, which can only be

when the court is in session. The term to which the writ is returnable, is called the *appearance term*; and the time specified, the *return-day*. When it becomes necessary to send process to another county, it is directed to the sheriff thereof. The execution of the command of the writ is denominated *service*. A summons is *served* by leaving a copy thereof with the defendant, which is called *personal service*; or leaving it at his usual residence, which is called *service by copy*. As no writ is valid after the return-day, it must be served before, and the sheriff is bound to use reasonable diligence. The *return* is endorsed on the back of the writ. If the sheriff return the writ "*served*," the defendant, though he makes no appearance either by himself or attorney, is held to be *in court*, and may be proceeded against accordingly. If the return be "*not found*," another writ may be issued called an *alias*, and a third called a *pluries*, and so on, indefinitely. If you believe the defendant, though not found, to be still lurking in the county, you may move the court to have *proclamation* made. This is a warning to the defendant to appear, published three successive days at the door of the courthouse, and three times in some newspaper; after which, you may proceed, as if service had been made. If the defendant remove to another county after issuing the writ, and before service, you may have a writ to that county, which is called a *testatum summons*, and differs from the common writ only in *stating the fact* of such removal. This is allowed on the ground that a suit has been already *commenced* in the first county before the removal; the general principle being, that suit must be commenced in the county where the defendant is at that time. But if there be more than one defendant, and residing in different counties, you may select the county where either is found; and if your cause of action be founded on a contract, you may issue to all the other counties; otherwise, you can only proceed against those found in the county where you commence, and may be under the necessity of instituting several suits, in different counties, for the same cause of action. In all cases, however, the true course is to name all the defendants in the first *precipe*; and then the sheriff will state in his return those not found; which statement will authorize the requisite proceedings as to them. The writ follows the *precipe*, in the description of the parties, the kind of action, and the damages; and hence the necessity for accuracy in the specifications of the *precipe*. On this writ the clerk indorses the cause of action as stated in the *precipe*; and if the plaintiff be not a resident of the county, the writ must be indorsed by some responsible freeholder of the county as security for costs. It is then delivered to the sheriff for service. Usually this is done by the clerk as a matter of accommodation; but the clerk discharges his duty by delivering it to the plaintiff or his attorney. The sheriff is bound to make the service in a reasonable time, if the defendant can be

found; and if he fail to do so, or make a false return, he is liable in damages on his official bond. There is also a summary proceeding on motion, called *amercement*, to enforce this liability. When the clerk issues a writ, he enters the suit in its order on the *appearance docket*, by substantially copying the precipe; and when the writ is returned, the substance of such return is also there noted. The same is true of all subsequent proceedings, until the issue is made up, when the suit is transferred to the *issue docket*. (a)

Capias. This is the name of a writ *commanding the sheriff to take the defendant, and have him before the court to answer the charge of the plaintiff*. It is called a *capias ad respondendum*, to distinguish it from another writ, issued after judgment, called a *capias ad satisfaciendum*. In common language, however, we call the former simply a *capias*, and the latter a *ca. sa*. It directs that the defendant be *compelled* to appear, while a summons merely directs that he be *notified*. Like that, it is made returnable forthwith, or to the next term, according as it is issued in term-time or vacation. There are, however, certain persons who are *privileged from civil arrest*, at all times; there are others, who are privileged at particular times; and there are certain times and places, when and where all persons are privileged. *First*, in this state, officers and soldiers of the revolution, and females are privileged at all times. *Secondly*, members and officers of the federal and state legislatures; judges, attorneys, officers of court, jurors, witnesses, and suitors; officers and soldiers of the militia, and voters, are severally privileged, while going to their respective places of duty, while remaining there, and while returning. *Thirdly*, all persons are privileged on Sunday and the fourth of July, and in the halls of the legislature and courts of justice, during the sittings therein. Against these classes of persons, therefore, a *capias* would have no more effect than a summons. But with these exceptions of privilege, the plaintiff may have a *capias*, whenever he will make affidavit that the defendant is indebted to him in any sum above one hundred dollars, naming the amount; and that he is about to remove his

(a) *Writ of summons*. The state of ———, county of ———. To the sheriff of said county, [or coroner if the sheriff cannot act]. We command you to summon ——— [the defendant] to appear before our [describe the court] forthwith [or on the first day of the next term as the case may be], to answer unto ——— [the plaintiff], in an action of ———, in damages \$———; and have you then and there this writ with your doings thereon. Given under the seal of said court this [date]. Attest ——— clerk. [Seal of court.]

I have omitted the word, "*greeting*," in the address to the sheriff, as superfluous. Sometimes writs have the following *teste*—"Witness the honorable ——— [presiding judge of said court]"—then the date, seal, and attestation of the clerk. But as the judge never signs his own name, this adds nothing to the authority of the writ, and may be omitted. The writ is sufficiently authenticated by the seal of the court and the signature of the clerk.

property out of the jurisdiction, or convert it into money, or conceal it, or otherwise dispose of it with a view to defraud his creditors; or that he fraudulently contracted the debt; or that he is about to remove his person from the jurisdiction; or that he is not a resident of the state. The affidavit, (a) as we have seen, must be filed with the precept. The indorsement on the *capias* is the same as that on the summons; and the same remarks are applicable with respect to an *alias*, *pluries*, or *testatum capias*. A *capias* is *served* by arresting the defendant. Mere words do not constitute an arrest. The sheriff must touch the body of the defendant, or lock the door upon him, or do some other act of like nature. After once touching him, he may break open his house to take him, but not before. For till then, a man's house is his *castle* against civil arrest. If, however, the outer door be open, the sheriff may enter, even though he have to break an inner door. If the sheriff, having it in his power, fail to make the arrest; or having made it, suffer the party to escape, he becomes liable to an action for damages on his official bond. When the defendant has been thus arrested, he has an option of three things; *to put in bail*; *to take the benefit of the insolvent act*; or, *to go to jail*; in which latter case he may have the *prison limits*. I shall describe these in their order.

Bail. There are two kinds of bail; namely, *appearance bail*, and *special bail*; sometimes called *bail below* and *bail above*. *Appearance bail* is only necessary when a *capias* issues in vacation. It is the bail given *to the sheriff*, for his own indemnification; he being held answerable for the appearance of the defendant from the moment of arrest. It consists of a bond, with such sureties as the sheriff shall approve, in double the amount claimed by the plaintiff, conditioned that the defendant shall appear according to the exigency of the writ. Upon giving appearance bail, the defendant is released from custody, and the sheriff returns a copy of the bail-bond. The condition of this bond is complied with, if the defendant appears according to the exigency of the writ, and either puts in special bail in court, or surrenders himself into the custody of the sheriff. If the defendant fails to do either of these things, the plaintiff has an option of two reme-

(a) *Affidavit for a capias.* A. B. the above plaintiff [or his agent or attorney] makes oath and says, that C. D. the above defendant is justly indebted to the above plaintiff in the sum of _____ dollars, in manner and form as stated in the above precept, and that the above defendant is not a citizen or resident of this state, [or some other reason specified in the statute.]

A. B.

Jurat. Subscribed and sworn to before me a [official character] this _____ day of _____ in the year _____.

E. F.

Writ of capias, [omitting the caption and attestation which are the same as in a summons].—We command you to take _____ [the defendant], and him safely keep, so that you have his body safely before our [describe the court], forthwith, [or on the first day of the next term], to answer unto _____ [the plaintiff], in an action of _____, in damages \$_____; and have you then and there this writ with your doings thereon.

dies. He may either take an assignment of the bail bond from the sheriff, and proceed against the sureties; or he may take a rule upon the sheriff to bring in the body of the defendant during the term, and on failure, compel him to pay the debt and costs and look to the sureties in the bond. For the law regards the defendant as in the custody of the sheriff from the moment of arrest until special bail is put in. But the sheriff may, for his own indemnity put in special bail and await the result of the suit. These steps in default of special bail must be taken before filing the declaration; otherwise the right to special bail is waived. (a) *Special bail* is given in the form of a *recognizance*, (b) in which the defendant and his sureties acknowledge themselves indebted to the plaintiff, in double the amount of the claim, which they agree to pay, if default be made in the conditions of the recognizance; which are, that if the plaintiff shall prevail in the suit, the defendant shall either pay the judgment and costs, or surrender himself to the sheriff, or the sureties shall pay for him. Upon giving special bail, the clerk makes out a *bail piece* (c) purporting that the defendant is bailed or delivered to his sureties; which is sufficient authority for them to take their principal, wherever they can find him, if they become apprehensive that he does not mean to be forthcoming. The sufficiency of the sureties is judged of, in the first instance, by the clerk; but the plaintiff has an opportunity of *objecting*, and thereby requiring them to *justify*; that is, to make oath that they are worth the amount named in the recognizance, after their debts are paid. The subject of bail is one of great intricacy; but in this outline I purposely avoid details. It will be seen by the view presented, that the object of taking bail is not to obtain absolute security for

(a) *Bail bond.* Be it known that [the defendant and his sureties] are held and firmly bound unto [the sheriff], in the sum of \$—— [double the amount indorsed on the writ], for the payment of which we do jointly and severally bind ourselves by these presents, sealed with our seals, and dated this [date]. But the condition of this obligation is, that if the above named [defendant] shall appear before the [describe the court], on the first or second day of their next term, to answer to the above [plaintiff], in an action of ——, in damages \$——, then this obligation is to be void. [Signed and sealed by the defendant and his sureties].

(b) *Recognizance of special bail.* The state of ——, county of ——, Be it remembered that on this [date] —— and —— [the sureties], of the county aforesaid, personally appeared before the [describe the court], and severally acknowledged themselves to owe unto the [plaintiff] the sum of \$—— [double the amount indorsed on the writ], to be levied upon their several goods and chattels, upon condition, that if —— [the defendant] shall be condemned in this action, he shall pay the costs and condemnation of the court, or be rendered or render himself into the custody of the sheriff for the same, or that in case of failure, the said [sureties] will pay the said costs and condemnation for him. Taken and acknowledged the day and year above written before me —— [judge or clerk, as the case may be].

(c) *Bail piece.* The state of ——, county of ——, court of ——, Be it known that —— [the defendant] of said county, was delivered to bail on a *cepi corpus* unto —— and —— [the sureties] of said county, at the suit of —— [the plaintiff] in an action of ——, this [date]. Attest —— clerk. [Seal of court].

the debt; but only security for the forthcoming of the defendant at the final termination of the suit. In theory, the defendant is in the custody of the sheriff from the time of giving appearance bail, until that of giving the special bail; after which, the sheriff's liability ceases; and the defendant is considered to be in the custody of the special bail sureties. Thus, by means of bail, the plaintiff has as good security for the final forthcoming of the defendant, at the end of the litigation, as if he had been kept during all this time, in the actual custody of the sheriff; but if, at any time, the defendant surrender himself, or be surrendered, into the custody of the sheriff, he is then in the same predicament as if he had not given bail; that is, he must either take the benefit of the act or go to prison. When judgment has been recovered against the defendant, if he do not comply with the condition of the recognizance, the first step in order to fix the bail, is to issue a writ of *capias ad satisfaciendum*; and if this writ be returned "not found," an action of *debt* or *scire facias* may be commenced against the bail on their recognizance, giving fifteen days between the service and return day of the writ; and if within that time the principal be not forthcoming, the bail cannot afterwards discharge themselves by surrendering him. But if, in the mean time, the principal die or be imprisoned, so that he cannot be taken on a bail-piece, this will be a discharge.

Benefit of the insolvent act. If the defendant on being arrested, wishes to avoid giving appearance bail, in the first instance, or special bail afterwards; or if, at any time, he wishes to release his bail, he may avail himself of "the act for the relief of insolvent debtors." This act is passed, as we have seen, in pursuance of a declaration in the constitution, "that the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law." The design of the act is to exempt insolvent debtors from imprisonment, on account of any debt due by them, at the time they apply for the benefit of it, upon the condition of their honestly surrendering all their property, for the general benefit of all their creditors. As we have already seen, it does not, like a *bankrupt act*, discharge the debtor absolutely from his debts, but only from imprisonment on account of them; for his future acquisitions still remain liable. Two classes of persons may take the benefit of this act; namely, *first*, all persons not under arrest, who have resided two years in the state, and six months in the county; and, *secondly*, all persons under arrest in a civil action, whether on mesne or final process, and whether residents in the state or not. An officer appointed by the court of common pleas and denominated *commissioner of insolvents*, is fully empowered to receive from applicants an assignment of their property, and distribute the proceeds among their creditors. To prevent fraud,

the assignment must be made under oath, and severe penalties are annexed to dishonesty or concealment. The proceedings before the commissioner are only preliminary to a final examination in court. But to secure the applicant from imprisonment, in the mean time, the commissioner grants a *certificate*, containing a *schedule* of all the specified debts, which secures him from imprisonment for any of those debts, until he can be heard in court. If, after hearing all objections, the court are satisfied that all has been fair and honest, they grant a *final certificate*, containing the same schedule, the effect of which is, for ever to exempt the applicant from imprisonment, within the state, on account of any of these specified debts. The taking of the benefit of this act, therefore converts a *capias*, for any of these debts, into a summons; for upon producing the certificate, the officer is bound at once to release the person arrested, without bail, and return the fact upon his writ. (a) The service, therefore, in such case, only operates as a notification or summons to the defendant.

Prison limits. (b) If the defendant when arrested cannot find bail, and will not take the benefit of the act, he must go to jail. But even then he is not necessarily obliged to remain in close confinement. By giving a *bond* to the plaintiff, conditioned for his safe continuance in the custody of the jailor, he may obtain the privilege of *prison limits*. In 1805, these limits extended only four hundred yards from the jail: in 1821 they were so enlarged as to embrace the corporate limits of the township: and in 1833 they were again enlarged so as to embrace the whole county. Now, therefore, the *bond* only requires the debtor to remain within the county. The privilege extends to all persons imprisoned *for debt*, whether on mesne or final process. The defendant must be actually *committed* to prison before the bond can be taken; but when the bond has been executed, his privileges within the limits are the same as those of any other person. He cannot however for a moment overstep these limits, without making his sureties liable. The sheriff ceases to be in any manner responsible after the execution of the bond. The sufficiency of the sureties is determined by two judges or justices of the peace; and if they should prove bad, the plaintiff is without remedy. When the defendant takes this course, the sheriff returns the fact, and the plaintiff proceeds against him, as in custody.

Attachment. (c) The next writ by which an action may be commenced, is a *writ of attachment*. It may be resorted to whenever the cause of action is founded on a contract, judgment, or decree; and the debtor *absconds*, or is *not a resident* of the

(a) But this does not apply to a *capias* from the federal courts. *Duncan v. Darst*, 1 Howard, 301.

(b) See *Lucky v. Brandon*, 1 Ohio, 49; *Lytle v. Davies*, 2 Ohio, 277.

(c) See *Sergeant on Attachments*; *Cowden v. Hurford*, 4 Ohio, 132; *Taylor v. M'Donald*, 4 Ohio, 149.

state, so that a *capias* or summons cannot reach him. These facts must be evidenced by an *affidavit* (a) of the plaintiff or his agent, accompanying the precipe. The writ of attachment *commands the sheriff to attach the property of the defendant of every description within the county*. It must be done in the presence of two disinterested persons, who make out an inventory of the property attached, under oath. If the defendant has no tangible property which can be attached, but has debts due him, or property in the hands of other persons, this is stated in the affidavit; and the debtors or persons having his property may be *garnisheed*; which is done by notifying them of the suit, after which they are held liable for the amount, and may be compelled to answer under oath as to the facts. Notice of the suit is given by advertisement, and it must stand three terms before judgment. The defendant may appear at any time before judgment, and by putting in special bail, or surrendering himself into custody, discharge his property. The attaching creditor does not attach for himself alone, but for the equal benefit of all creditors who may file their claims in time. As the defendant by these proceedings, may be deprived of his property without having what is called *his day in court*, or even *actual notice* of the suit, our court has manifested a disposition to construe the statute strictly. If, therefore, any one of several joint debtors is within the state, the property of the rest cannot be attached. If the sheriff attach personal property, he may return it to the party in possession upon his giving bond in double the appraised value, conditioned for the forthcoming of the said property or its appraised value in money to answer the judgment. If this be not done, the sheriff retains possession. In either case he returns an inventory and appraisement. If the property be of a perishable nature, the court on motion will order it to be sold. If the sheriff cannot come at the property, he garnishees the person having it in possession, by serving him with a copy of the writ and affidavit; together with a notice to appear at the next term of the court, and answer such questions as may be put to him touching the property or credits in his hands belonging to the defendant. Written interrogatories are thereupon filed, to which the garnishee must put in written

(a) *Affidavit for a writ of attachment.* A. B. the above plaintiff makes oath and says, that C. D. the above defendant is justly indebted to him in the sum of _____ dollars in manner and form as stated in the above precipe; and is not a citizen or resident of this state, [or absconds]; and that _____ is in possession of the following goods and chattels [describe them] belonging to the said defendant, and is otherwise indebted to the said defendant. [Jurat as before]. A. B.

Writ of attachment. We command you to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of _____ [the defendant], wheresoever they may be found, and the same to keep, or so provide that the same or the value thereof may be forthcoming to answer the judgment of [describe the court] in an action of _____, therein prosecuted by _____ [the plaintiff], in damages \$_____, on the first day of their next term; and have you then and there this writ with your doings thereon.

answers under oath. Upon proper showing the garnishee may be compelled to give security for the forthcoming of such property or credits. Upon the return of the writ it is the duty of the clerk, on demand of the plaintiff, to make out an advertisement of the pending of the attachment within thirty days, which must be published for six weeks in some newspaper. The declaration and subsequent proceedings are the same, as if the suit had been commenced by a summons or *capias*; except that the defendant, unless he appear and plead, must be called and defaulted at the first and second term; and judgment cannot be had against him until the third term. In the mean time all other creditors may file their declarations, and thus come in for their share of the proceeds of the property attached.

Replevin. The nature of this action, as regulated by our statute, has already been described. The *affidavit* (a) accompanying the precipe, after specifying the goods to be replevied, must state that they belong to the plaintiff; that they are wrongfully detained by the defendant; and that they were not taken in execution on any judgment against him; nor for any tax, fine, or amercement assessed against him; nor by virtue of any writ of replevin or other process issued against him. The *writ* (b) commands the sheriff to cause the goods mentioned in the affidavit to be replevied to the plaintiff; and also to summon the defendant to appear and answer for the unlawful detention thereof. In executing this writ, the sheriff may break open any building in which the property may be, if peaceable entry be refused. But before the property is delivered to the plaintiff, it must be appraised by two disinterested freeholders, under oath administered by the sheriff; and the plaintiff must give *bond* (c) to the defendant in double the

(a) *Affidavit for a writ of replevin.* A. B. the above plaintiff makes oath and says, that he has good right to the possession of the goods and chattels described in the above precipe; that the same are wrongfully detained by C. D. the above defendant; and that the same were not taken in execution on any judgment against the said plaintiff, nor for the payment of any tax, fine or amercement assessed against him, nor by virtue of any writ of replevin, or other mesne or final process whatever, issued against him. [Jurat as before]. A. B.

(b) *Writ of replevin*, [omitting caption and attestation]. We command you to cause to be replevied unto ——— [the plaintiff], the goods and chattels following, to wit, [describe them as in the precipe], which ——— [the defendant] wrongfully detains from [the plaintiff] as is claimed; and also to summon the said [defendant] to appear at the next term of [describe the court] to answer unto [the plaintiff] for the unlawful detention of the said goods and chattels, in damages \$——, and have you then and there this writ with your doings thereon.

(c) *Replevin bond.* Be it known that [the plaintiff and his sureties] are held and firmly bound unto [the defendant] in the sum of \$—— [double the appraised value], for the payment of which we do jointly and severally bind ourselves by these presents, sealed with our seals and dated this [date]. But the condition of this obligation is, that whereas the said [plaintiff], on the [date of the writ], sued out of the [describe the court], a writ of replevin against the said [defendant], for the following goods and chattels to wit, [describe them], which writ is returnable to the next term of said court; now if the said [plaintiff] shall prosecute the said suit to effect, and pay all costs

appraised value, conditioned to prosecute the suit to effect and abide the judgment. This bond and an inventory of the replevied goods are returned by the sheriff, and the suit proceeds as in other cases.

Appearance. (a) We have now traced the proceedings up to the time of the defendant's appearance in court. Anciently the defendant was required to appear personally or by attorney in court, and cause an entry to be made of that fact on the record. This appearance might be enforced by proceeding to *outlawry*, which placed the defendant and his property beyond the protection of the law. But nothing of this kind exists in our practice. Appearance by attorney is generally equivalent to a personal appearance; and as a motive for causing such appearance to be made, we substitute the consequences of *default* in the place of outlawry. The theory of all judicial proceedings is, that after service and return of process, the defendant is to be treated as in court. This is actually true only when the process is a *capias* or *habeas corpus*. In all other cases, where the process does not require the body to be brought into court, but is merely a notification to appear, the defendant is either considered to be in court, after service and return of process, so that he may be proceeded against to judgment without any act on his part; or, if necessary to the purposes of justice, as in cases of *mandamus* and *quo warranto*, his actual appearance may be enforced by attachment for contempt. But otherwise we substitute a virtual for an actual appearance. It being however an established rule, that an appearance cures all defects in process, it becomes important to know what constitutes an appearance for this purpose. When the process is a *capias*, the entering of special bail is considered an appearance; and in all other cases, the filing of a plea or demurrer, or doing any other act of record is considered an appearance; but the entering the attorney's name on the margin of the docket is not. At any time before appearance, as thus described, the defendant may move to have the process quashed for irregularity or informality.

§ 211. *Pleading.* (b) Having described the process by which the defendant is brought actually or virtually into court, I am next to consider the proceedings which take place in court. Of these, the first, in order, are the *pleadings*; by which are meant the formal statements of the complaint and defence, by the counsel of the parties, preliminary to a trial. The professed object of

and damages which shall be awarded against him, then this obligation shall be void.
[Signatures and seals.]

(a) Steph. on Plead. 29, 34.

(b) On the subject of pleading, see 3 Black. chap. 20, 21; 1 Swift's Dig. b. 3, chap. 14—21. For the theory of pleading, the best book is that of Stephen, and the next, Gould or Lawes. For the practice, the best work is that of Chitty; the first volume contains the general principles, and the second and third, the forms of pleading.

these rules of pleading is to bring the parties to what is called an *issue*; that is, to extract from their allegations the exact matter in controversy, divested of every thing extraneous, and resting upon direct affirmation and negation. At first view, this would seem to be an easy thing. If the plaintiff only state with clearness and precision the nature of his complaint, and the defendant do the same with regard to his defence, one would suppose that an issue might thus be made without any artificial rules; but instead of this, *special pleading* has been wrought up, by a series of refinements, into an art so difficult, that it requires years of study and practice to master it. Anciently the pleadings were conducted *orally*, (a) and taken down by the clerk. Up to 1353, the record was in Norman French; from which time to 1730, it was in Latin; and since the latter epoch it has been in English. When the pleadings ceased to be oral, a distinct class of lawyers grew up, called *special pleaders*, who were compensated for their labor in proportion to the number of words employed. From these facts four important consequences have resulted; namely, *first*, the pleadings are still expressed, as if made *orally*, and taken down by the clerk. *Secondly*, the style of pleading is exceedingly clumsy and awkward, being for the most part a very literal translation of the old French or Latin. *Thirdly*, pleadings are redundant beyond all example, being stretched out and amplified, by means of pleonasms, synonymes, and tautologies, to the utmost possible length, in order to increase the fees. This abuse, however, has been partially reformed in this country, by abolishing the English rule of compensation, and having no distinct class of special pleaders. *Fourthly*, the system of pleading abounds with exceeding subtlety and technicality. The common observer would be apt to regard it as a wonderfully elaborate monument of the misdirected ingenuity of man. Those, however, who have spent the best part of their lives in exploring its mysteries, hold it to be the perfection of logic. Between these opinions it is not necessary for me to decide. We take the system as it has come down to us from by-gone ages, with now and then an innovation, where changes have been most urgently demanded; and it will be my aim in this outline, to bring into view some of its leading characteristics, without entering at all into details.

Declaration. (b) The pleadings commence with the plaintiff's statement of his case, which is called the *declaration*, *narration* or *count*. The *caption* specifies the state, county, court, and term, the names of the parties, and of the action. Then follows a full and formal *description* of the cause of action, which forms the main body of the declaration, and of course varies according to the circumstances of each case; but the precedents collected in the books of pleading, are now so numerous, as to

(a) Steph. Plead. 31—39.

(b) Steph. Plead. 39—55.

meet almost every case that can arise. The *conclusion* states the *damages* as laid in the precipe and writ. The declaration thus framed, is signed by the plaintiff's attorney, and filed in the clerk's office, where a copy is made out for the other party. The time within which pleadings must be filed, is regulated by certain *rules*, which the courts are authorized to establish; and which become the law of the court establishing them. These rules generally require the pleadings to be closed, and the case brought to issue, during the vacation next after the appearance term; and the consequence of a failure on either side, without good cause, will be a judgment of some kind against the party in default. If for example the plaintiff neglect to file his declaration within the time required by the rules, it will be in the power of the defendant to have a judgment of *nonsuit*. With these remarks I proceed to lay down some general rules for framing declarations. (a)

Fulness. The declaration must contain upon its face a complete cause of action. The omission of any material fact will either occasion a loss of the cause, or expense and delay in *amending* the defective part. The ancient rigor of the law did not permit amendments; but the English *statute of jeofails* first provided for them, and this has been generally imitated in this country. In this state provision is made for amending any of the proceedings in civil suits, at any time, upon such terms as the court shall prescribe. So that a slip of the pen or an error in judgment will not now defeat a meritorious cause. But while every material fact must be stated, care should be taken to avoid *immaterial averments*; because there is an arbitrary rule which requires a party to prove what he alleges, though not necessary to have been alleged. (b)

Certainty. The certainty required in pleadings includes both precision and particularity, as opposed to ambiguity and gene-

(a) The merely formal parts of a declaration are the caption and conclusion, which are the same in all declarations. The *caption* is as follows: "The State of ———, County of ———, Court of Common Pleas, ——— Term, in the year ———. A. B. by ——— his attorney, complains of C. D. in an action of ———." Then follows the *descriptive part* beginning—"For that, &c.," for which see the specimens annexed to a description of the several actions. The *conclusion* is as follows.—"To the damage of the plaintiff ——— dollars, and therefor he sues." The following is a specimen of a complete declaration in case for immoderately riding a horse:

The State of Ohio, Hamilton County, Court of Common Pleas, November Term in the year 1842.

A. B. by E. F. his attorney, complains of C. D. in an action of case; for that heretofore, to wit on the first day of January in the year 1842, to wit, at the county aforesaid, the defendant hired of the plaintiff a certain horse to ride from Cincinnati to Lebanon and back again, for a certain sum of money agreed on between them; and the plaintiff then and there delivered to the defendant the said horse for the purpose aforesaid; and the defendant then and there so immoderately rode the said horse, that by reason thereof, and for want of due care, the said horse afterwards, to wit, on the same day, died. To the damage of the plaintiff one hundred dollars, and therefor he sues.

By E. F., Attorney for Plff.

(b) Conn v. Gano, 1 Ohio, 493.

rality. The rule is, that when a pleading admits of two constructions, that shall be taken which operates most against the pleader. You must therefore use such definiteness and specification, that any other meaning than that which you intend to convey, would be far-fetched and unnatural. You are to state *facts* only, and not legal inferences; and you are to state them categorically, and not by way of recital or argument. But you need not state matters of evidence, nor matters which rest more in the knowledge of your adversary. In describing *written instruments*, you are not generally obliged to set forth more than relates to your case; and you may merely state their substance if you prefer so to do; but if you undertake to give the exact words, you must do it literally: and there is one class of instruments called *specialties*, including matters of record and under seal, which come within an arbitrary rule, requiring a *profert* or full copy to be exhibited, upon the *oyer* or demand of the adversary. I call this rule arbitrary, because it does not include all writings; for the principle, if it were universal, would perhaps be salutary. Indeed we have a statutory provision which does, though in another way, attain the same end in all cases, by requiring each party, on the demand of the other, to furnish a copy of any writing, or a *bill of particulars* of any matter or claim, which he refers to in his pleading, or intends to prove at the trial, before the other party can be required to plead. If therefore a party be taken by surprise, it is his own fault, in not demanding a bill of particulars.

Several counts. It is a general rule that no pleading may be *double*. As applied to the declaration, this rule requires that several distinct matters shall not be alleged in *the same count*, to support a single complaint, when either, by itself, would be sufficient; because, the object of pleading is to narrow the controversy down to a single specific point. But this does not hinder the plaintiff from joining several *distinct demands* in the same declaration, provided they be of the same nature, by means of *several counts*. This privilege was allowed at common law; but our statute, in affirming it, adds, in order to prevent abuse, that the defendant before making up the issue, may move to have superfluous counts stricken out. This rule allowing several counts was manifestly intended for cases, where there were really distinct claims or causes of action. But advantage has been taken of it, to set forth the same identical cause of action, in several different shapes, in order that the evidence may be certain to fit some one of them, and thus save the consequence of what is called a *variance* between the allegation and proof. The same motive has also occasioned a departure from the rule of certainty, by introducing what are called the *common counts*. These are, for goods sold and delivered; for work, labor, and materials; for money lent; for money paid; for money had and received; and for balance of account. These counts are expressed in language of the

utmost generality; and it is very common to join them all in the same declaration, together with a special count on the actual contract, though there be in reality but a single cause of action. But in order to save appearances, the phraseology of the different counts is always such as to import distinct causes of action; and damages are only alleged at the end of the declaration. The consequence of this indulgence is, that it is often impossible to decide from the declaration alone, and without recourse to a *bill of particulars*, what the defendant is to be called upon to meet at the trial. It is a general rule, that if a pleading be bad in any part, it is bad altogether; but where there are several counts, this rule only applies to each count by itself. A single good count, therefore, will save the declaration. At common law, if after a general verdict, one count was found to be bad, the verdict was set aside, because it might possibly have been rendered upon the count. But our statute enables the plaintiff to avoid this result, if the defect be discovered beforehand, by having the jury instructed to disregard the defective counts.

Common counts. (a) These may be used equally in declarations in debt and assumpsit, and may be joined with any special counts in either of these actions. And as they are of very general use in pleading, I will here state the particular office of each of them. 1. The count *for goods sold and delivered*, may be used whenever the object of the suit is to recover the price of any personal property sold to the defendant, either upon his prior order or subsequent acceptance; and there seems to be no good reason why the price of real property may not be recovered under a similar count for land sold. If the price be not fixed by the parties, the law implies the market price, or *quantum valebant*. If delivery be not necessary to perfect the sale, this count will still be good because the word, *delivered*, may be treated as surplusage. 2. The count *for work, labor and materials* may be

(a) *Declaration in assumpsit on the common counts.* For that heretofore, to wit on ———, at ———, to wit at the county aforesaid, the said defendant was indebted to the said plaintiff in the sum of \$——, for goods, wares, and merchandize before that time sold and delivered by the said plaintiff to the said defendant at his request.

And in the further sum of \$——, for work and labor before that time done, and materials for the same provided, by the said plaintiff for the said defendant at his request.

And in the further sum of \$—— for money before that time lent by the said plaintiff to the said defendant at his request.

And in the further sum of \$—— for money before that time paid, laid out, and expended by the said plaintiff for the use of the said defendant at his request.

And in the further sum of \$—— for money before that time had and received by the said defendant for the use of the said plaintiff.

And in the further sum of \$—— for money found to be due by the said defendant to the said plaintiff for the balance of an account then and there stated between them.

And in consideration thereof the said defendant then and there undertook and promised the said plaintiff to pay him the said several sums of money when thereunto requested; yet though often requested, he has not paid the same nor any part thereof, but refuses so to do.

used whenever the object of the suit is to recover compensation for any kind of service rendered to the defendant, either upon his prior request or subsequent acceptance, and for any kind of materials furnished by the plaintiff in the course of such service. If the rate of compensation be not fixed by the parties, the law implies a reasonable compensation, or *quantum meruit*. 3. The count *for money lent* may be used whenever money has gone directly from the plaintiff to the defendant with the understanding that it should be repaid, whether it were a technical loan or not. 4. The count *for money paid* may be used whenever the plaintiff, by the prior direction or subsequent approval of the defendant, has paid money to any other person on his account or for his use. 5. The count *for money had and received* may be used whenever the defendant has received money in any way, which of right belongs to the plaintiff. It is often called the *equitable* count, because the doctrine is, that if the defendant has money which in good conscience the plaintiff ought to have, the defendant holds it for his use, and he may recover it under this count. 6. The count *for balance of account* may be used whenever there has been a running account between the parties, and a balance struck in favor of the plaintiff. To constitute such account there must be both debits and credits, or items on each side. If the defendant has not assented to the balance struck, the plaintiff must prove the correctness of the account. The balance being thus ascertained, the law implies a promise to pay it, and this is the most convenient count to recover it; for it may include matters contained in all the other common counts. Without it, the plaintiff must sue for the whole amount of the debits, and the defendant must bring in the credits by way of set-off.

Description of persons, place, time, quantity and value. The rule in describing *persons*, is, that their full and exact *names* must be given; but in this country there is no law requiring their *additions, titles, or occupations*. When the parties have been once accurately named in the introduction, brevity suggests that they be referred to, in future, merely as plaintiff and defendant. The *place* where a thing happened, is technically called its *venue*, from *venire*, because the jurors are required *to come* from that place. Anciently it was the immediate village, hamlet, or neighborhood; now it never descends below the *county*, where the action is tried. The rule then is, that every material fact must be alleged to have happened within the county, which forms the venue of the action. This is usually done by naming the county in the beginning of the description, and afterwards referring to it by the word "*there*." There are some actions which are called *local*; because they can only be tried in the county where the facts occurred, unless for special reasons the court should permit the venue to be changed. Such are all actions relating to land. In these, therefore, the venue alleged is the true place. But the great majority of actions

are *transitory*, and may be brought in any county where the defendant may be found. In these, therefore, the rule must often require a fiction, and sometimes a contradiction in terms. Thus in declaring upon a contract made in London, you say that it was made "at London, to wit, at the county aforesaid." You must name the true place, because it forms a part of the description of the contract; and then you bring it within the venue of the action by means of a *videlicet*, *scilicet*, or "*to wit*." This *videlicet*, as used in pleading, may be considered as an apology for not stating the exact truth; such being in fact its office, not only with regard to place, but also with regard to time, quantity and value. For in alleging *time*, the rule is that you must allege *some* time for each material fact, but unless the time forms the gist of the action, you need not allege the true time, provided you place it under the salvo of a *videlicet*. The custom is to state a convenient time in the beginning of the description, never descending below days; and afterwards to refer to that time by the word "*then*." Again in alleging *quantity* and *value*, the rule is similar; you must allege some quantity and value, when the action involves them, and you cannot prove a greater than you allege; but if you have used a *videlicet*, you may prove a less. These rules respecting place, time, quantity, and value, form glaring exceptions to that certainty and truth, which the theory of legal proceedings would seem to require; and which a novice would naturally expect to find in practice. In fact they have the appearance of bordering closely upon absurdity. Why require these matters to be stated at all, if the truth be of no consequence? And if the truth be important, why not require them to be alleged truly? Were men to use fictions in their common transactions, as much as they are allowed to do in their legal proceedings, there would be little confidence between man and man. But so are the precedents.

Demurrer. (a) When the plaintiff has thus framed and filed his declaration, the defendant must answer thereto within the time fixed by the rules, or suffer the consequences of *default*. There are two ways of answering the declaration, namely, by *demurrer*, and by *plea*. And first by *demurrer*. To *demur* is to *pause*. The party demurring in effect declares that he will proceed no further, until he has the judgment of the court whether the plaintiff, by his own showing, has any cause of action. Thus a demurrer admits the *facts* alleged by the adversary, but denies their *legal sufficiency*. It tenders an *issue in law*, for the decision of the court without a jury. It may be taken upon every pleading whatsoever, except a demurrer and a general issue; and it opens all prior pleadings to the examination of the court, who give judgment against the party committing the first error. Now, a pleading may be defective either in *substance* or *form*; if in

(a) Steph. Plead. 65.

substance, the demurrer is *general*, that is, it does not specify wherein the defect consists; but if in form, the demurrer must be *special*, because it is required to point out the defects. A special demurrer, however, is so framed as to include a general demurrer, and thus cover defects in substance. An issue in law being thus tendered, the other party must accept it, or give up his cause. This acceptance is signified by putting in a *joinder*, which merely asserts the sufficiency of the pleading demurred to; and the issue being thus made up, the case is ready for argument to the court. I will suppose, for example, that the defendant demurs to the plaintiff's declaration. If, on hearing, the court *sustain* the demurrer, this is a decision that the declaration is insufficient, in which case, the plaintiff must either abandon his case, or obtain *leave to amend*. On the subject of amendment, as already remarked, our law is very liberal, leaving the matter to the discretion of the court. In the present instance, the conditions of leave would probably be an affidavit of a meritorious cause of action, and the payment of all *costs* since filing the defective pleading. On the other hand, if the demurrer be *overruled*, this is a decision that the declaration is sufficient in law; in which case the defendant must either obtain *leave to plead*, on terms similar to the preceding, or suffer a judgment for the plaintiff's claim, to be ascertained by an *inquiry of damages*, if necessary. Should the declaration contain several counts, the defendant must answer them all, either by demurrer or plea, or both; but he cannot demur and *plead* to the same count, at the same time. It follows, then, that if you are willing to admit the *facts* alleged by your adversary, and rest your cause simply upon the question of *law*, you may demur; but this is not always the best course, because almost all *substantial defects* may be taken advantage of at subsequent stages, either on *arrest of judgment* or *writ of error*, as will be explained hereafter. As to *questions of form*, they cannot be raised at subsequent stages. The conclusion is, that unless you are quite sure of succeeding on demurrer, and doubtful on the question of fact, the better course is to try the latter first; and if you fail here, you can afterwards raise the question of law. I will only remark further, that the admission of a general demurrer is another instance of departure from the rule requiring certainty. Why should not the demurrant be required to point out the substantial, as well as formal defects, upon which he relies! Would not the great object of all pleading, which is information and not concealment, be better promoted? (a)

(a) *General demurrer*. And the said defendant comes and demurs to the said declaration, and says that the matters therein contained are not sufficient in law to maintain the action aforesaid; wherefore he prays that the plaintiff may be barred of his said action.

To make a *special demurrer*, add as follows:—And for causes of demurrer the said

Plea. (a) If the defendant does not think proper to demur, his only alternative is to *plead*. A plea raises a *question of fact*, as a demurrer does a question of law. It occurs only in answer to the declaration; but it does not admit the law of the plaintiff's declaration, as a demurrer does the facts; for the question of law still remains in reserve. It would seem, at first view, that there could only be two kinds of pleas, namely, first, those which simply deny the allegation of the declaration, and which are called *traverses*; and, secondly, those which admit these allegations, but evade their legal effect by setting up new matter, and which are called pleas of *confession and avoidance*; and these two classes do, in fact, comprehend the pleas most frequently used. But there is still another class, called *dilatory pleas*, or *pleas in abatement*, because they operate merely to delay the proceedings, without touching the merits of the case; in contradistinction to which, all other pleas are called *peremptory pleas*, or *pleas in bar*. And since these dilatory pleas can only be pleaded at a preliminary stage, and then only in a given order, I will first name them in the order in which they must be pleaded.

Dilatory pleas. (b) The *first* is, that the court has not *jurisdiction* of the cause. If this plea be sustained, the plaintiff must seek his remedy elsewhere. If this plea be overruled, or not pleaded, the defendant may plead to the *disability of the plaintiff*; as, that he is an alien enemy, and, therefore, not entitled to sue at all; or, that he has only a joint interest, and, therefore, not entitled to sue alone; or, that he is not entitled to sue by the name he assumes; or that there is no such person in being. If this plea be overruled, or not pleaded, the defendant may plead to his own *disability*, either to be sued at all, or sued alone, or sued by that particular name. Formerly, though an *infant* might sue by his guardian or next friend, he was not liable to be sued; and he might set up his infancy by a *parol demurrer*; that is, a plea praying that proceedings may be stayed until his majority. But this is altered by our statute, which requires a *guardian ad litem* to be appointed, and the cause to proceed as in other cases. Also the defendant might formerly set up his *joint liability* with another, as ground for abating the suit against him alone. But our statute does not allow the suit to be abated by this plea. The plaintiff is merely required to issue a summons against the other persons named in the plea, and the suit goes on as before. A *misnomer* of the defendant is also good ground for a plea in abatement, because he would otherwise be liable to be

defendant specifies the following: first, because &c. [setting forth each cause separately].

Joinder in demurrer. And the said plaintiff comes and joins in the said demurrer, and says that the matters contained in his declaration are sufficient in law to maintain his action, wherefore he prays judgment and his damages.

(a) Steph. Plead. 67, 76.

(b) Steph. Plead. 68—75.

sued again by his right name, for the same cause. If this plea be overruled, or not pleaded, the defendant may plead to the *declaration*, as not conforming to the writ, either in reference to the parties, the kind of action, or the amount of damages. The *pendency of a prior suit*, in the same or in another court, between the same parties and for the same cause, is also good ground for a plea in abatement. There are also some other subdivisions of pleas in abatement, but they seem to be of no importance. In general, with the exception of pleas to the jurisdiction, all these pleas are required to show how the plaintiff may correct his mistake in a new suit; or, in technical language, to furnish a better writ. The chief object, therefore, is *delay*; and great abuse was formerly practised by the use of these pleas; but our statute goes far to prevent such abuse, by providing that no dilatory plea, other than to the jurisdiction of the court, or where the facts appear of record, shall be received without affidavit of its truth; and that if a plea in abatement be overruled, the defendant shall pay full costs down to the time of overruling it. The ancient form of commencing all pleas was this—"And the defendant comes and *defends*, &c."—which means, comes and *denies*; and a very nice distinction was made between full defence and half defence. But as this distinction is now obsolete, the allegation, that the defendant defends, is superfluous. These dilatory pleas, like all pleas which set up new matter in defence, conclude with a *verification*—"And this the defendant is ready to verify; wherefore he prays judgment, &c." When the matter pleaded in abatement is not sufficient in law, the plaintiff may demur to the plea, and thus an issue of law will be made up, as before described. But otherwise he must take issue upon some matter of fact set up in the plea, by filing a replication. For example, if the defendant plead the pendency of a prior suit, which is matter of record, the plaintiff may reply that there is no such record—*nul tiel record*. To this the defendant may put in a *rejoinder*, that there is such a record; and thus an issue would be made up, which the court would try by an inspection of the record. (a)

Traverse. (b) A traverse merely denies the allegations of the plaintiff, without setting up new matter. There are two kinds of traverse, the *special traverse* and the *general traverse* or *general issue*. The one specifically denies one or more of the plaintiff's

(a) As an example of a dilatory plea, the following is the form of a plea of the pendency of a prior suit:—And the said defendant comes and pleads to the said declaration, and says that before the commencement of this suit, to wit on ———, the said plaintiff sued him in the [describe the court], in an action of ———, for the same cause of action set forth in his said declaration, as appears by the record of said suit remaining in said court; which prior suit still remains undetermined; and this he is ready to verify; wherefore he prays judgment, if he ought to answer in this present suit, and for his costs.

(b) Steph. Plead. 76.

allegations ; while the other, in comprehensive language, denies them altogether. And it being a general rule in pleading, that whatever is not denied is admitted, it follows that a special traverse requires the plaintiff to prove only those allegations which are specifically denied ; while a general issue requires them all to be proved, because all are denied. For example, if to a declaration in trover the defendant should put in a special traverse, simply denying that the plaintiff owned the goods, this would be all the plaintiff would be required to prove ; whereas if the general issue were pleaded, the plaintiff would be required to prove the additional fact that they were converted by the defendant. For this reason the general issue has almost universally taken the place of the special traverse, being more advantageous to the defendant.

General issue. (a) On account of the universal prevalence of this mode of pleading, I shall describe the general issue in each of the actions. 1. The general issue in *debt*, on a sealed instrument, may be *non est factum*---that the said writing obligatory is not the defendant's deed. This, though called a general issue, is in fact very much limited ; since it only puts in issue the *execution* and *validity* of the instrument. Under it, the defendant may contend, either that he never executed the instrument, or that it is void ; and he can set up no other defence : but another general issue applicable to all actions of debt is *nil debet*---that the defendant does not owe the sums of money alleged by the plaintiff. This issue, being a general denial of indebtedness, is much broader than the other, and authorizes the defendant to set up anything which goes to deny an existing debt ; as release, satisfaction, arbitrament, and the like. 2. The general issue in *covenant*, is the same as in debt, namely, *non est factum*, and the same remarks apply to it. 3. The general issue in *assumpsit*, is *non assumpsit*---that the defendant did not undertake or

(a) The forms of these general issues, with the similiter added, are as follows :—

Non est factum. And the said defendant comes and pleads to the said declaration, and says that the said writing obligatory therein mentioned is not his deed ; and of this he puts himself upon the country, and the plaintiff does the like.

Nil debet. And the said defendant comes and pleads to the said declaration, and says that he does not owe the sum of money therein mentioned, or any part thereof to the said plaintiff ; and of this he puts himself upon the country, and the said plaintiff does the like.

Non assumpsit. And the said defendant comes and pleads to the said declaration, and says that he did not undertake and promise in manner and form as the said plaintiff has therein alleged ; and of this he puts himself upon the country, and the said plaintiff does the like.

Not guilty. And the said defendant comes and pleads to the said declaration, and says that he is not guilty in manner and form as the said plaintiff has therein alleged ; and of this he puts himself upon the country, and the said plaintiff does the like.

Non detinet. And the said defendant comes and pleads to the said declaration, and says that he does not wrongfully detain the goods and chattels therein mentioned, or any part thereof ; and of this he puts himself upon the country, and the said plaintiff does the like.

promise as the plaintiff has alleged. At first view this would seem, like *non est factum*, merely to put in issue the making of the promise or its validity: but in practice, it is equally comprehensive with *nil debet*; since the defendant, under it, may set up anything tending to deny an existing liability; as a release, performance, and the like. 4. The general issue in *trespass* is, *not guilty*. This would seem from the language, to be the broadest issue possible, but in practice, it merely puts in issue the fact of committing the trespass; and under it the defendant can set up nothing by way of justification. 5. The general issue in *trover* is the same in words, namely, *not guilty*; but in practice it is much broader, since it covers every thing going to deny the plaintiff's right of recovery. 6. The general issue in *detinue*, is *non detinet*—that the defendant does not wrongfully detain the goods of the plaintiff. This is comparatively narrow; since it covers only the fact of detaining the goods, and the fact that they belong to the plaintiff. 7. The general issue in *replevin* was formerly *non cepit*—that the defendant did not take the goods of the plaintiff; because a wrongful taking was the gist of the action; but since our statute has made a wrongful detention the gist, it would seem that the general issue ought to be *non detinet*, as in *detinue*. 8. The general issue in *case* is *not guilty*; and here the words are used as broadly as in *trover*; since they cover almost every possible defence. 9. The general issue in *ejectment* is *not guilty*: because this action is in form trespass; but here the words are more comprehensive than in trespass proper, since they cover every species of defence, even the statute of limitations, which is covered by no other general issue. It is obvious that the extensive prevalence of general issues in pleading, is the result of a great relaxation from its original strictness and particularity. Like the common counts in the declaration, these general issues cease to effect one of the main objects of pleading, which is to notify your adversary fully and particularly of the points upon which you rely. In fact *special pleading* in its original spirit is now almost obsolete; and but for the provision before referred to, authorizing a demand of a *bill of particulars*, each party might be left almost totally in the dark, as to what evidence would be offered at the trial. Another serious objection is found in the perfectly arbitrary character of these general issues, as to their comprehension; some covering almost every thing, and others being narrowed down to one or two points, without any fixed principles of reason or expression to determine the one or the other. These considerations have led many to doubt whether the convenience of this general mode of pleading is not a poor compensation for its want of certainty. If the parties were required in all cases to exhibit specifically their respective grounds, as was the ancient custom, and is still the theory of pleading, perhaps the ends of justice would be better promoted; especially, if unnecessary techni-

calities were dispensed with. At all events the present mixed system, partly special and partly general, wants harmony and congruity, more than almost any other part of the law. But in this connection, it is proper to refer to a provision of our statute, which has a salutary effect upon the practice in certain actions of contract; namely, that when the contract is a bond, bill or note, and the general issue is pleaded, without an affidavit of its truth, the plaintiff shall not be required to prove the execution of the contract by the defendant. This is a highly useful provision; for the plaintiff is thus apprised whether one of the material facts is to be contested or not, and can prepare himself accordingly. All general issues conclude *to the country*, as it is called—"and of this he puts himself upon the country"—that is, with tendering an issue of fact to be tried by the jury; and this issue, like an issue of law, the plaintiff must accept, or give up his case; for being a simple denial of the truth of his declaration, it cannot be demurred to. The acceptance of this issue is signified by a replication called a *similiter*—"and the plaintiff does the like"—that is, he refers his cause in like manner to a jury. In strict practice the *similiter* should be put in by the plaintiff; but it is usually added by the defendant to his plea, because it is a matter of course.

Pleas of confession and avoidance. (a) This is the only remaining class of pleas. They are commonly called *special pleas*, and used when the defendant is ready to admit the facts alleged by the plaintiff, but has new matter upon which to rest his defence, as a justification, discharge, or the like. This new matter in avoidance is set forth with the same particularity as in a declaration; and the plea, instead of tendering an issue to the jury as in a traverse, concludes *with a verification*. The plaintiff must then either demur to this plea or put in a *replication*. If he replies, it may either be by a simple traverse of the plea, or by a confession of the new matter of the plea, together with a statement of other new matter to avoid its effect. This last, being a replication by confession and avoidance, must conclude with a verification and not a tender of issue. The defendant, therefore, must either demur to it, or put in a rejoinder. If this rejoinder be a traverse, it brings the cause to issue as before described. If a confession and avoidance, it requires a *sur-rejoinder* from the plaintiff; and so on, to a *rebutter* and *sur-rebutter*. But it is very seldom that pleadings extend beyond the rejoinder; for new matter cannot be inexhaustible; and where new matter is not alleged, an issue either in law or fact, is always tendered and accepted, which terminates the pleadings. This will be obvious from the following considerations. If the new matter set up in the plea be insufficient in law to constitute a defence, a demurrer and joinder make up the issue. If not true, the replication will be a traverse and the rejoinder by a

similiter will make up the issue. If both sufficient and true, it can only be met by a replication of confession and avoidance, setting up other new matter; in which case, the defendant must either demur, or rejoin by way of traverse or confession and avoidance; and so on, until an issue be made up either on demurrer or traverse; for to one or the other of these the pleadings must come, when there is no longer ground for a confession and avoidance. This may be illustrated by an example. Suppose an action of assumpsit upon a promissory note. The defendant pleads the statute of limitations—that he did not promise within fifteen years. As this is a sufficient defence, if true, it cannot be demurred to. If not true, the plaintiff will reply by way of traverse—that he did promise within fifteen years—and then a similiter will complete the issue. But though this plea be both true and sufficient, of itself, there may be new matter to avoid it, as that the defendant was absent from the state, at the time the cause of action accrued; in which case, the time does not begin to run until his return to the state. This then may be replied by way of confession and avoidance. The defendant will not demur to this replication, because, if true, it is sufficient. If he rejoin by way of traverse, denying the fact of absence from the state, the sur-rejoinder will be a similiter, which will complete the issue. But this replication may be both sufficient and true, and yet there may be other new matter to avoid its effect. The defendant may have returned to the state more than fifteen years before the commencement of the suit; in which case, he will rejoin by way of confession and avoidance, setting forth this fact. The plaintiff will not demur to this rejoinder, because if true it is sufficient. If not true, he will sur-rejoin by way of traverse, and the rebutter will be a similiter, which will complete the issue. But there may still be other new matter to avoid this rejoinder, though true and sufficient of itself. The return to the state may have been clandestine and not open; in which case, the sur-rejoinder will be by way of confession and avoidance, setting forth this fact. And here the new matter is exhausted. The issue is reduced to the question whether the return was clandestine or open. The rebutter will therefore be a traverse, and the sur-rebutter a similiter, which will complete the issue. (a)

Notice in place of a special plea. The kind of special pleading

(a) As an example of a plea of confession and avoidance, I will give the form of the plea of *son assault demesne*, to a declaration in trespass for an assault and battery:—And the said defendant comes and pleads to the said declaration, and says that at the time and place when and where the said trespass is supposed to have been committed, to wit on ———, at ———, the said plaintiff, with force and arms, did assault and beat the said defendant, and would have further injured him, but that he did then and there defend himself; which defence is the trespass complained of; and so the injury, if any was done, was from the assault of the said plaintiff upon the said defendant, and in self-defence; and this he is ready to verify; wherefore he prays judgment, if the said plaintiff ought to maintain his said action.

just described is now in a great measure superseded by the practice of pleading the general issue, and appending a *notice* of any special matter, by which is meant such matter as cannot be offered at the trial under the general issue alone. Unfortunately no general rule can be laid down to determine, in all cases, what may and what may not be offered in defence under the general issue. All that can be said is, that when by the arbitrary rules on this subject, any given defence must be particularly set out, it must be done either by a special plea or notice. Our statute authorizes a notice (*a*) in all cases except that of tender, and this exception is probably the result of oversight. This notice is intended to inform the opposite party of the precise nature of the defence, and must therefore be as full and particular as a special plea, from the form of which it differs only in the introduction and conclusion. But the effect of the notice is very different from the special plea in this, that being appended to the general issue, the only replication required is a similiter, and the pleadings are always terminated at this stage. The result therefore is to do away with special pleadings, strictly so called. And the only matter of regret is, that the requirement of notice is not made universal, whenever general pleading is resorted to. Let the plaintiff, whenever he uses the common counts, annex a notice of what his claim is; and the defendant, whenever he pleads the general issue, annex a notice of what his defence is, and the system would perhaps be the best possible. But at present we cannot be said to have a system of any sort. It is neither general pleading nor special pleading, but an accidental compound of both.

Several pleas. At common law, when the declaration contained several counts, the defendant might set up a separate defence to each. Thus he might demur to one count, traverse another, and confess and avoid a third; or he might plead the same plea to each. But until the statute of Anne, he was not allowed to put in several pleas to the same count. Our statute imitates this, and allows the defendant, with leave of the court, to plead "as many several matters" as he shall deem necessary. But if, on demurrer, any of these pleas be adjudged insufficient, he must pay the costs; accordingly it is common to have several distinct issues in the same suit; but the pleas, however numerous, can only consist of the kinds before described. As to the leave of the court required by the statute, it is seldom in fact asked, because sure to be granted of course; and yet this privilege, like that of

(a) As an example of *notice*, I will take the case of *set-off*:—And the said plaintiff will take notice, that on the trial of this suit the said defendant will insist by way of set-off, that before and at the commencement thereof, the said plaintiff was and still is indebted to him in the sum of \$——, for [set forth the indebtedness as in a declaration, either specially or by the common counts, or both]: and by reason thereof the said defendant will demand a judgment for such balance as may then and there be found to be due to him, according to the statute in such case provided.

several counts, is very liable to abuse. For we often find the most inconsistent defences set up to the same cause of action; as *not guilty* and a *release*; *non est factum* and *payment*; *non assumpsit*, the *statute of limitations* and *infancy*. Indeed it is said that the only pleas that would be objectionable on the ground of inconsistency, are the *general issue* and a *tender*; though for this single exception, there is certainly no good reason, which would not embrace many other cases. When several pleas are pleaded, all after the first are prefaced thus—"and for a further plea, by leave of the court, &c." And for each of the pleas thus pleaded to each of the counts in the declaration, there must ultimately be a distinct issue: so that it is possible to conceive of an almost infinite number of issues made up in one action. This evil however is in a great measure prevented by the rule for avoiding what is called a *departure* in pleading; which is, that neither party can, at any subsequent stage of the pleadings, set up any new matter which is repugnant to that before set up by him, though he may enlarge and render more definite the ground before taken. I will only add, that the consequence of a failure to demur or plead within the time required by the rules is, that the plaintiff may obtain a judgment by default. Such a judgment merely determines the plaintiff's right to recover, but not how much; and the case then stands for inquiry of damages. But the defendant may have his default opened and obtain leave to plead, by making affidavit that he has a meritorious defence, provided he will bring the cause at once to issue. In like manner, the plaintiff must put in his replication within the time required by the rules, or the consequence will be a nonsuit; which however may be set aside on like terms; and so on until the issue be made up.

Special matters of defence. The foregoing remarks sufficiently explain the general nature of pleading. But for further illustration, I will speak of some of the special matters of defence, which occur most frequently.

Set-off. (a) At common law, if the plaintiff was indebted to the defendant, the latter had no means of setting off such debt in the suit against him, but was driven to a cross action. This evil, however, has long been remedied by legislation. By our statute, if the action be on a pecuniary contract, and the defendant at the commencement of the suit held, in the same right, a like claim against the plaintiff, he may bring it in by way of set-off; and if he neglect so to do, he cannot in a subsequent action for it recover costs. But unless the set-off amount to an actual payment, it cannot be brought in under the general issue. Set-off, strictly so called, must either be pleaded specially or by way of notice; and the court will render judgment for the party having the balance

(a) See Montagu on Set-Off; Babington on Set-Off; also Barbour on Set-Off, an American work.

in his favor. By being due in the same right, is meant, that an individual debt cannot be set-off against a partnership debt, nor a debt due to the defendant in his own right against a debt due by him as administrator, and vice versa. And as to the kind of debt which may be set-off, it must be strictly a pecuniary claim, and not for consequential damages. Set-off is confined to actions of contract; and the true test is, to inquire whether the defendant could have sued the plaintiff for the subject-matter of the set-off, in the same action in which he is now sued. Judgments, however, in all actions may be set-off, because they are liquidated debts. Our practice, on account of the peculiar wording of our statute, is to give notice of set-off instead of pleading it specially; and as there is no replication to a notice except the similiter, all objections to it may be taken at the trial without previous intimation.

Accord and satisfaction. Where the claim is for a liquidated debt, payment in full need never be pleaded specially, but may be proved under the general issue. But if such claim has been settled by any thing short of full payment, or if it be for unliquidated or consequential damages, and has been settled by the parties, this settlement is technically called *accord and satisfaction*, and is a good defence to a suit, if it be pleaded specially or by notice. But to constitute this defence it is not enough that the parties have agreed upon the terms of settlement, which would be accord only. They must have completed the settlement, so that no further action is required; and such a compromise will be effectual in all cases not criminal.

Infancy. We have seen that infants sue by their next friend or *prochein ami*, and defend by their guardian *ad litem*. The technical reason is that an infant cannot appoint an attorney. We have also seen that an infant is not bound by any contract, unless it be for necessities. But the defence of infancy cannot be offered under the general issue. It must be pleaded specially or by notice. If pleaded, and the contract were for necessities, this may be replied in confession and avoidance. If notice be given of it, the fact that the contract was for necessities may be proved at the trial.

Tender. The defendant has the privilege of making a *tender* of what he admits to be due the plaintiff, for the purpose of saving interest and costs. The practice is here regulated by statute; and it so happens that a tender is the only thing, which must be pleaded specially, and cannot be proved under the general issue and notice, on account of the peculiar wording of our statute. Where the action is on a pecuniary contract, the *money* may be tendered at any time before suit. Where it is on any other contract, *performance* may be tendered at the time and place specified. Also for a trespass upon real property *sufficient amends* may be tendered. In either case, if the plaintiff refuse the tender, and do

not recover more, he must lose the interest and costs. There is still another provision, which allows the defendant to bring into court at any time before the trial, without mention of it in the pleadings, the amount which he admits to be due to the plaintiff, with costs up to that time, and if the plaintiff refuse to take it, and do not recover more, he thenceforth loses interest and costs. We have before seen that no state can pass any law making any thing but gold and silver a legal tender. Hence the creditor may object to receiving bank notes. But unless he make this objection at the time, he is taken to have waived it, and thus a tender in bank notes not objected to will be good. It is also held that the money need not be actually produced and counted, unless that be insisted on; for it is sufficient to show at the trial, that the defendant was in a condition to substantiate his offer. A tender may be pleaded to part of the amount claimed, and the general issue as to the rest; but no plea of tender either of part or the whole can be united with the general issue as to the whole, because the two are repugnant. The plea of tender must allege that the defendant has been at all times ready to pay the amount tendered; and therefore a subsequent demand and refusal is a good replication in confession and avoidance.

Plea puis darrein continuance.(a) By the common law, the parties might at any time ask for an *imparlance*, that is, an opportunity to confer together; but no such practice prevails here. The issue must be made up before the trial term, or the party in default must suffer a judgment against him, if the adversary demand it, unless the court see cause to grant indulgence; and at the trial term, the cause must be called up in its order and disposed of, unless by agreement it be placed at the heel of the docket, or *continued*. A *continuance* is necessary at each term, to keep the cause in court. The reason usually alleged, after issue joined, is the want of testimony. The party wishing a continuance for this cause, must make affidavit that he has used due diligence to obtain it; that it is material; and that he expects to obtain it soon; and if he applies a second time, he is usually required to set forth what he expects to prove, that his adversary may admit it, if he choose. This mode of procuring delay, is often perverted; but some such provision is necessary for the purposes of justice. And it often happens that a defence may arise after the continuance of a cause, which did not exist when the issue was made up. In such case the defence must be set up by plea *puis darrein continuance*, which means, since the last continuance. For example, a release given before issue joined may be offered in evidence under the general issue; but a subsequent release must be set up by a plea since the last continuance.

Demand of oyer.(b) It has been already stated that the plain-

(a) Steph. Plead. 87, 97.

(b) Steph. Plead. 93.

tiff in his declaration upon any *specialty* must make *profert* of it. This is done by an averment that the specialty is now in court, or words to that effect. The origin of the rule is this. When the pleadings were oral, and the plaintiff counted on a specialty, the defendant had a right to demand *oyer*, (a) that is, to hear it read; and it was then read from beginning to end. Now the same end is obtained in the following manner. The plaintiff makes *profert* as before stated. This authorizes the defendant to demand a copy, which must be furnished before he can be required to plead. If his defence rest upon matter contained in it, he sets forth the instrument at length in his plea, and then specifies wherein his defence lies. The effect is the same, as if it had been fully set forth in the declaration, and after *oyer*, the defendant may either demur or plead.

§ 212. *Trial. (b)* When the parties have thus made up an issue, the next step is the trial of that issue. If it be an issue of law, the trial is by the court, who hear the arguments of counsel, and then pronounce judgment; but if it be an issue of fact, the court will not try it, unless it be submitted by consent of parties; except in the single case, where the existence of a record is put in issue, by the plea of *nul tiel record*. This issue can be decided only by the production of the record denied, for the inspection of the court, who thereupon decide whether it be the alleged record or not. But as to all other questions of fact, there must be a *trial by jury*. Formerly there were other modes of trial, as by *inspection*, by *certificate*, by *witnesses*, by *wager of battle*, and by *wager of law*. But as none of these prevail in this country, I will not waste time by describing them. *The trial by jury* is of high antiquity, and forms the boast of the common law. We have seen that it operates, by a division of the judicial power, as one of our constitutional safeguards. We have also seen, that by the seventh amendment of the *federal* constitution, it extends "to all suits at common law, where the value in controversy shall exceed twenty dollars." The language of our state constitution is, that "the right to trial by jury shall be inviolate;" and similar expressions are found in all the state constitutions. But these declarations, even where they are unqualified, are not designed, as we have seen, to exclude equity and admiralty jurisdiction, which is exercised without a jury; because the same constitutions recognise both. The right, then, to a trial

(a) The form of *demanding oyer* is as follows:—"The defendant comes and craves oyer of the said writing obligatory, and it is read to him in these words: [here the instrument is copied]; which being read and heard, the defendant says, &c."

I have already said that there is no good reason why this doctrine of *profert* and *oyer* should not extend to all written instruments; and that in practice, our provision for a bill of particulars does virtually produce this result.

(b) See 1 Swift's Dig. b. 3, chap. 22; 3 Black. chap. 22, 23; Steph. Plead. 107—113.

by jury, is confined to proceedings in courts of law, where *legal rights*, as distinguished from *equitable*, are decided upon. Nor are they intended to take away the jurisdiction of justices of the peace, who usually decide without a jury; because the provision of the federal constitution is confined to proceedings in the federal courts; and the state constitutions recognise the ancient powers of justices of the peace. Besides their decisions being never final, the dissatisfied party may always appeal, and thus have his trial by jury. Lastly, a jury need not necessarily consist of *twelve men*, though this is the usual number required by law. But our statutes frequently provide for a less number, to determine facts in controversy. Thus three persons appraise the value of property under the law regulating executions, and occupying claimants; six persons form the jury in trials of the right of property, and in forcible entry and detainer; seven, in trials of lunacy; and five, in cases arising under the apprentice act. A jury therefore may consist of any convenient number of men designated by law. The spirit of the constitutional provisions respecting trial by jury is, that in legal proceedings, the power to decide finally upon law and fact, shall not be vested in the same persons; and instead of wasting words in eulogy of this institution, I proceed to show how jurors are designated, and what are their functions. I would previously observe, however, that admirable as the jury system is admitted to be, it has one feature, which has been the subject of much difference of opinion. I refer to the *entire unanimity* required for their decision. Many have doubted whether it would not be an improvement, at least in civil cases, to dispense with entire unanimity, so difficult to be obtained, when there is room for doubt, and only require a specific majority, say two thirds or three fourths, to concur in a verdict.

Jurors. Our jurors are required to have the qualifications of electors, which have been before described. The legislature fixes a number sufficient for all the courts in each county, no one serving more than one term in each year. These are annually apportioned among the townships, by the clerk of the court of common pleas, according to the number of white male adults. The township trustees *select* the number allotted to their township, and return a list to the clerk of the court; but the mode of selection is not specified. The names thus returned are put into a box, and thirty days before each term of court, the sheriff and clerk draw out twenty-seven. The first fifteen so drawn are *grand jurors*, who only act in criminal cases, and need not now be described. The remaining twelve are *petit jurors*, sometimes called *trial or traverse jurors*, who serve both in civil and criminal cases. A writ then issues, called a *venire facias*, commanding the sheriff to summon the jurors thus designated, to appear on the first day of the term, which writ is served ten days before the term. The

jurors thus summoned are bound to serve unless excused. The number of twelve constitutes the *panel*. If it should not be full, for the trial of any cause, the deficiency is supplied from bystanders, who are called *talesmen*, and are selected by the sheriff. When the panel is full, each party may *challenge* two jurors *peremptorily*, that is, without assigning any cause; and *for cause*, each may challenge any number, who are obnoxious, and the court will try the challenge. The principal causes of challenge are, conviction of any crime; interest in the cause; having been an arbitrator, or juror in the same matter before; being of kin to either party; standing in the relation of master, servant, or attorney; being summoned as a witness; not understanding the language; or any other cause tending to disqualify one from acting intelligently and impartially. Provision is also made for a *struck jury*, at the request of either party. In this case, the clerk draws forty names from those in the box; from this list, the parties proceeding alternately strike out twenty-four, and of the remaining sixteen, the first twelve who are not challenged, form the struck jury. When the panel is thus completed, the oath is administered, by which the jurors bind themselves, "to give a true verdict according to the evidence." This oath, (a) it may be observed, binds the conscience only, for the violation of it, by giving a false verdict, cannot probably be punished as perjury, under the definition of that offence heretofore given. It is much to be regretted that the organization of our juries cannot be altered with respect to the talesmen or bystanders. The objection is that they are selected by the sheriff, and generally from those immediately round the court. This affords an opportunity, at least, for collusion and corruption, by selecting persons who are known to favor one of the parties. Would it not be an improvement to have *supernumeraries* selected in the usual way, to supply probable deficiencies in the panel? This would certainly diminish the present evil, if not remove it entirely.

Evidence. (b) The subject of evidence includes all those rules which regulate the procurement and presentation of testimony in courts of justice. Strictly speaking all evidence consists either of facts proved by *personal testimony*, or of *inferences* drawn from facts so proved. And this leads to a division of evidence into

(a) The following is the form of a *juror's oath*.—"You and each of you do solemnly swear in the presence of Almighty God, that you will well and truly try the issue joined between the parties in this cause, wherein ——— is plaintiff, and ——— is defendant, and a true verdict give according to the evidence, unless lawfully discharged therefrom; and this you do as you shall answer to God at the great day." The *affirmation* begins—"You and each of you do solemnly declare and affirm that &c."—and concludes—"And this you do under the pains and penalties of perjury."

From which it will be seen that the affirmation makes no appeal to God or a future retribution, but relies for its sanction wholly on the temporal consequences of perjury.

(b) On the subject of evidence, the principal treatises are those of Greenleaf, Swift, Peake, Gilbert, Phillips, Starkie, and Roscoe. The two first are American works.

positive, presumptive, and circumstantial. Positive evidence includes all facts directly proved. Presumptive evidence includes all those inferences which the law itself draws from facts directly proved. Circumstantial evidence includes all those inferences which the jury draw, according to their discretion, from facts directly proved. Where evidence is such that it cannot be admitted at all, it is said to be *incompetent*, and where it does not apply to the issue, *irrelevant*. These are questions of law for the court. The *credibility* of testimony is a question of fact for the jury after it has been admitted by the court as both competent and relevant. All evidence is divided into *primary* and *secondary*. Primary evidence in a given case, signifies the highest and best evidence which that case admits of. Secondary evidence, of course, includes all other degrees; and it is a fundamental rule that secondary evidence will not be received, while primary can be had. Thus the best evidence of the contents of a paper is the production of the paper. The next best evidence is a sworn copy. And the next, the recollection of a witness who had read the paper. And the general rule is, that a lower degree of evidence will not be received, without first showing that a higher degree cannot be had. Again, all evidence is divided into *written* and *unwritten*. Written evidence includes *writings of record* and *writings not of record*. Unwritten or parol evidence includes all other kinds. When written documents are offered in evidence, the first step is to prove their *genuineness*, that is, that they are what they purport to be. The next question is as to their *effect* as evidence. And of the different degrees of written evidence, records are the highest; since the facts they contain cannot be contradicted by any other evidence; and next in order are unrecorded writings, which cannot be contradicted by unwritten evidence. Records are either *public* or *private*. Public records are kept in public offices, and not allowed to be removed therefrom; and as they cannot be produced in court, the law permits them to be proved by *exemplification*. An exemplification of a record is a copy thereof made and certified by the proper officer, under the proper seal; and this, though in fact secondary evidence, is universally received as primary. Whereas, private records, those of corporations for example, not being confined to one place, must be proved like other writings.

Order of introducing testimony. As a general rule the party having the affirmative of the issue begins by presenting his testimony. It must be such as to make out a *prima facie* case, that is, it must be sufficient to prove the issue, if nothing come from the other side. Otherwise the adversary may move the court to overrule the testimony and give judgment accordingly. In making this *prima facie* case, all the ground must be covered, which it is intended to occupy during the trial; for in strict practice no new matter can be offered at a subsequent stage of the

trial. The party having the affirmative then *rests*, and the adversary brings forward his counter-proof, the object of which is to assail the case made on the other side. If he bring forward no new matter, the testimony will here close. But if he adduce new matter, the first party may bring evidence to assail such new matter.

Records of this State. *Legislative proceedings* are evidenced by the *journal* which is kept by the clerk of each house. *Statutes*, however, are not set out in this journal, but are preserved in distinct *rolls* in the department of state. They are therefore evidenced by exemplifications, made by the secretary of state under the great seal. But as the secretary supervises the publication of these statutes, the printed volume is never objected to within the state. *Judicial proceedings* are evidenced by exemplification of the records thereof, made and certified by the clerk, under the seal of the court. Justices of the peace have no clerk or public seal; but they are required to keep *dockets* of their proceedings; and certified transcripts therefrom, are evidence of such proceedings. *Executive proceedings* are evidenced by exemplifications from the journal thereof, made by the secretary of state under the great seal. In addition to these public records of the state, the law requires *deeds*, *wills*, and *certificates of marriage*, to be recorded, as we have seen, in the public offices; and in the absence of the originals, copies duly certified by the proper officer, are admitted as evidence. These matters, however, being private, the records thereof, although public, do not stand upon the same footing of unquestionable verity, as those before spoken of; but only on the footing of their private originals.

Records of the United States. As the federal government extends over the whole Union, its proceedings, whether legislative, judicial, or executive, are proved in the same manner throughout the Union, as the records of a single state are within that state. Nothing, therefore, need be added on this head.

Records of sister states. In consequence of an express provision of the constitution, which has been remarked upon before, the states, with respect to their public acts and records, have ceased to be foreign to each other; and such acts and records, when proved as directed by the act of Congress, are declared to have the same effect in every other state, as in the state where they belong; but these have been sufficiently described already.

Records of foreign nations. As a general rule, our courts are not presumed to know the public officers or public seals of foreign nations; and, accordingly, their public acts and records must be proved in the same way as any other fact. There are instances, however, in which exemplifications under the great seal, accompanied by proof that it is the great seal, have been admitted. But even when proved, these records have not the same absolute

and conclusive verity as those of our own country. The facts they contain may be questioned.

Writings not of record. When such writings are produced in court, the first question is, whether they are really the writings they purport to be. But ancient deeds, maps, and histories, are usually admitted as such without question, on account of their antiquity. Also, the returns of sheriffs and other officers of court; and the notarial acts of notaries public usually pass unquestioned, because of their official character. But these are exceptions to the general rule, which is, that whenever a writing is offered in evidence, its genuineness or identity must first be proved. If there be a subscribing witness, he must be called; if he cannot be had, his absence must be accounted for, and then his handwriting may be proved, which will be taken as proof of the execution of the writing. If there be no subscribing witness, the handwriting of the maker must be proved. Our statute dispenses with the proof of the execution of bonds, bills and notes, as we have seen, unless denied under oath. When a witness is offered to prove handwriting, the general rule is, that he must have seen the person write. The only exception is where he has become acquainted with the handwriting by a correspondence with the person. It is not allowable to submit to the jury an admitted specimen of handwriting, that they may compare it with the one in dispute. The farthest that courts have gone in the comparison of handwritings, is to call men of skill to examine them, and let their opinion go to the jury. But in more recent decisions even this has been denied, unless the persons of skill have seen the person in question write. I have thus far supposed the writing to be in the possession of the party offering it. If proved to have been lost or destroyed, its contents may be proved by parol. (a) If in the hands of a third person, he may be required to produce it, by notice to that effect in the subpoena, which is thence called a *subpoena duces tecum*; if in the hands of the opposite party, notice must be given him to produce it, and on refusal the contents may be proved. If the interest of a party require the actual production of books and papers in the possession of the opposite party, our statute empowers the courts of law to enforce their production, whenever a court of chancery would do so. For this purpose ten days' notice must be given, particularly describing the books or papers required; at the expiration of which a motion may be made for an order that they be produced. If the order be granted upon the plaintiff and he fail to comply, a judgment of nonsuit may be entered against him; if upon the defendant, and he fail, a judgment by default. When a writing is thus made evidence, its effect upon the issue is to be gathered from its

(a) As to lost deeds, see *Allen v. Parish*, 3 Ohio, 107; *Blackburn v. Blackburn*, 8 Ohio, 81; *Armstrong v. M'Coy*, 8 Ohio, 128; *Starke v. Smith*, 5 Ohio, 455.

contents; and this is partly a question of law for the court, and partly a question of fact for the jury. The general rule is, that no extrinsic or parol evidence can be admitted to explain any ambiguity in its contents, or supply any deficiency. But a distinction is made between *latent* and *patent ambiguities*. A patent ambiguity, is one apparent upon the face of the writing, and discoverable on the mere perusal. This cannot be explained by parol evidence, to show the actual meaning, because there would be danger of thus making a writing different from that which was intended. But a latent ambiguity, being discoverable only by reference to extrinsic facts, may be explained by extrinsic evidence. Thus if a writing name one person, and there happen to be two of the same name, the one actually meant may be ascertained by parol evidence.

Personal testimony. Personal testimony is that which is given under an oath or affirmation. (a) It is either given *orally* in court, or by *depositions*. But in either case, the first question is, who are competent to testify? and the law holds the following persons incompetent. 1. For want of requisite understanding, *idiots* and *lunatics* are always excluded; and *infants* are excluded, whenever, from express interrogation by the court, they are found not to comprehend the nature of an oath. 2. On the ground of *interest*, all persons are excluded who have the least direct *pecuniary interest* in the event of that particular suit; but not those who have an indirect interest, however great, in the question of fact therein disputed. When we reflect that, with the single exception of husband and wife, the nearest friends and relations of the parties are allowed to testify, notwithstanding the strong bias of affection, this absolute exclusion, for any merely pecuniary interest, would seem to be of doubtful expediency, to say the least. Yet so the law stands, and the only exceptions made by our statutes, are those of legatees in a will to which they are subscribing witnesses; persons testifying to their own accounts of not more than eighteen months' standing; and mothers of illegitimate children, as to who is the father. 3. On account of *infamy*, all persons are excluded in this state, who have been convicted of any penitentiary offence, except manslaughter, and duelling, unless afterwards pardoned. If this exclusion proceeds upon the ground that these persons would perjure themselves, and that the jury could not detect their falsehood, it seems unreasonable; and if this be not the ground, it is difficult to conjecture what is, or

(a) The form of the *oath* is as follows:—You solemnly swear in the presence of Almighty God, [or on the Holy Evangelists], that you will testify the truth, the whole truth, and nothing but the truth, in the case now pending wherein ——— is plaintiff, and ——— is defendant; and this you do as you shall answer to God. The *affirmation* begins—You do solemnly declare and affirm that, &c.—and concludes—and this you do under the pains and penalties of perjury.

It has been doubted whether the phrase—"the whole truth"—ought not to be omitted, because the witness may not be interrogated to that extent.

how a pardon would help the matter. 4. On account of *color*, in this state all "black and mulatto persons" are excluded from testifying in cases where either party is white. This rule, to say the least, approaches the verge of inhumanity; and hence our courts have decided that they will construe the provision strictly, and admit all persons above the shade of *half black*, which is the meaning of mulatto.^(a) 5. For want of *religious belief*,^(b) it has been the rule to exclude all persons who do not believe in the existence of a Supreme Being, and in a future state of retribution. But when our constitution declares, "that no human authority can, in any case whatever, control or interfere with the rights of conscience," it may well be doubted whether this inquiry can properly be made of a *witness*, to say nothing of the absurdity implied in questioning a witness as to his belief, for the purpose of showing that he is not worthy of belief. Besides, the oath of an atheist, though it wants the religious obligation which belongs to the oath of the believer, has yet the same temporal obligation resulting from the pains and penalties of perjury. For these reasons it would seem that the want of religious belief ought not to render a witness incompetent, though the jury may properly take it into consideration in weighing his credibility. These five classes of persons, together with husband and wife, where either is interested, comprehend all the persons who are *excluded* from testifying on the score of incompetency; and the only persons who are *privileged* from testifying, are attorneys, with reference to all matters professionally confided to them by their clients. Efforts have sometimes been made to obtain this privilege for clergymen and physicians, with respect to matters communicated to them in professional confidence; but without success.^(c) I have often felt a doubt, whether the question of competency had not better be altogether dispensed with. From the statements just made, you will readily perceive how often it must happen, that those who know most about the matter before the jury, cannot be heard at all, because incompetent. It is not pretended that all persons are equally entitled to belief; but the question is whether, with all the sanctions in favor of truth, and all the means of detecting falsehood, which the law so abundantly furnishes, we might not safely hear testimony from every quarter, and credit that which should seem worthy of credit. Equity does not hesitate to receive the testimony of the parties themselves; and why should courts

(a) See *Medway v. Natick*, 7 Mass. 88; *Gray v. Ohio*, 4 Ohio, 353.

(b) *Hunscom v. Hunscom*, 15 Mass. 117; *Wakefield v. Ross*, 5 Mason, 16; *Kisor v. Stanriper*, Wright, 323; *Easterday v. Kilborn*, Wright, 343.

(c) *Dutchess of Kingston's case*, 11 State Trials, 243; *Du Barre's case*, *Peake's Cases*, 78; 1 M'Nally, 254. But see the case of the *People v. Phillips*, decided in New York in 1813 by the court of sessions, and specially reported by Counsellor Sampson, and abridged in 1 *Western Law Journal*, 109, in which it was held that a Catholic priest was privileged from testifying. De Witt Clinton delivered the opinion. See also a work upon this subject by Austey, referred to in 5 *Law Reporter*, 237.

of law be more scrupulous? The question presents a choice of evils. By admitting all persons to testify, we should more frequently have false testimony, which sometimes would escape detection. By excluding certain classes of persons altogether, we often deprive ourselves of the only testimony which could develop the truth. Is not the latter evil the greater?

Attendance and examination of witnesses. Every litigant has a right to the personal attendance of witnesses, who are within the jurisdiction of the court, upon tendering the legal fees, if demanded. The first process is a *writ of subpœna*, which in form commands the witnesses to appear and testify under a *penalty* for disobedience; but which in fact, is nothing more than a *notice*. If the witness thus notified, refuse to appear, he may then be attached and brought in by force, to answer for his *contempt* of the process of the court. He is likewise answerable in *damages* to a party who should lose his cause for want of such attendance. When presented at the stand, he may be examined on the *voir dire*, which is a preliminary oath, to answer all questions touching his competency. If no objection be made on this ground, the regular oath or affirmation is administered by the clerk. The party who calls him, first examines him; and this is called the *examination-in-chief*. During this examination, no *leading questions* can be asked; that is, no questions so framed as to indicate the answer desired; but the witness may refresh his memory as to names and dates, by consulting his own memoranda. The *cross-examination* by the adversary, may be by leading questions, and as searching and particular as he pleases; for this is often the only way to detect a false witness. But cross-examination applies only to the matter brought out in chief. As to any new matter, the party makes the witness his own, and becomes an examiner in chief. When this examination is closed, the examiner in chief may cross-examine as to any new matter brought out on the other side. But he can bring out no further new matter himself, because this might make the alternation endless. A party is not permitted to discredit his own witness, because by calling him he has vouched for his credit; but he may disprove facts sworn to by him. Nor is the opposite party permitted to cross-examine as to any collateral or irrelevant matter merely for the purpose of contradicting the witness by other evidence. A witness is allowed to come back and explain any thing he has said before; but he cannot be called back, without consent of counsel or leave of court. The general rule is, that witnesses must testify as to their own *knowledge* only, and not as to their opinion, or as to what they have heard others say. In matters of skill and science, however, witnesses may be called expressly to testify as to their opinion; and there are some few cases, as pedigree, marriage, and character, in which general reputation is sometimes all the evidence that can be had. Each party may

give in evidence the admissions of the other, and his own expressions made in the presence of the other; and when part of a conversation has been detailed, he against whom it operates, may call for the whole. Witnesses are liable to be impeached, by showing that those who best know their reputation would not believe them under oath; but a party cannot fortify the credit of his witnesses, until it has been first assailed on the other side. A witness may for his own protection refuse to answer, when such answer would expose him to a criminal prosecution; but not when it would only expose him to a civil liability, or merely tend to disgrace him. (a)

8. *Depositions.* When the personal attendance of a witness cannot be had, either from infirmity, or from his being without the jurisdiction of the court, the party can only take his testimony by *deposition*. A deposition differs from an affidavit, in not being *ex parte*. Before a deposition can be made use of, the opposite party must have had an opportunity to cross-examine. Whereas an affidavit is taken without any notice to the party against whom it is to operate. We have two modes of taking depositions, in this state, namely, upon *notice* merely, and by *dedimus potestatem*.

Depositions may be taken *upon notice* as follows. The notice must be in writing, naming the time and place; and must be served upon the adverse party or his attorney, at such time as to allow him to attend by travelling twenty miles each day, exclusive of Sundays; and a copy of such notice, together with the proof or acknowledgment of service, must be attached to and returned with the deposition. The officers before whom it may be taken, are, any judge of a state or federal court, chancellor or master in chancery, justice of the peace, mayor, or notary public. The testimony must be reduced to writing in his presence, either by himself, the witness, or some disinterested person; and must be subscribed and sworn to by the witness; all which must be *certified* by the officer. The authentication is then made as follows.

(a) *Form of a subpoena.* To ——— [the witness]. We command you, that laying aside all manner of business or excuse, you appear before the court of ———, on the ——— [name the day and hour], then and there to testify in a certain action wherein ——— is plaintiff, and ——— is defendant; and this do under penalty of the law.

In a subpoena *duces tecum*, add:—and also that you bring with you a certain [describe the writing or document required].

Sometimes the subpoena is addressed to the sheriff, commanding him to summon the witness; but the above is deemed the more correct practice. If the witness has been personally served, and does not appear, a peremptory attachment may be had to bring him in; but if by a copy left at his residence, the practice is to grant a rule in the first instance to show cause why he should not be attached.

The form of the *writ of attachment* is as follows:—We command you, that without delay you attach ———, so that you have him before our court of ———, to answer touching a contempt which he has committed against said court, as is alleged, and further to abide such order as shall be made in this behalf.

If taken within the judicial circuit where it is to be used, the certificate of the officer, together with his official seal, if he have one, is sufficient; but if taken elsewhere, and before an officer having no official seal, besides the above certificate, the official character of the officer must be verified, either by parol evidence in court, or by the official certificate and seal of the clerk of the county or district court, or of the secretary of state. The deposition is then sealed up and directed to the clerk of the court where the cause is pending. It will be observed that depositions can be taken in this manner only within the United States; and where the place is very distant, the long notice required by law, is often a great inconvenience. (a)

Depositions may be taken by *dedimus potestatem*, as follows: Upon application to the court in term time, or to the presiding judge in vacation, a *commission* may be had, authorizing *any person* in any part of the world to take depositions in such time, place and manner, as shall be therein directed. The usual course is for the applicant to file his interrogatories with the clerk, and notify the opposite party; who then files cross interrogatories; and these interrogatories are annexed to the commission. Sometimes, however, a commission issues without interrogatories; provision being made for notice to the opposite party. The *commissioner* thus appointed has all the power of an officer under the preceding method, and proceeds in the same manner. Depositions taken in either of these ways, are of course open to all objections on the score of relevancy or competency, which could be made to the witness if present in court; and even when taken, they are not allowed to be read, if the witness can be had in court. There is one peculiar advantage in taking depositions by commission; namely, that by sending interrogatories with the commission, there need be no expense or trouble in employing counsel at a distance. The commissioner has only to take the answers to these interrogatories, in order to do justice to both parties. (b)

(a) *Form of notice.* A. B. v. C. D. Action of ———, in the Court of ———. Depositions will be taken in this case by the plaintiff [or defendant], before a competent officer, at ——— [giving not only the town, county, and state, but the place in the town], on ———, between the hours of ———; and will be continued from day to day between the same hours, if necessary. [dated and signed].

Form of the certificate. I, ——— [giving official character], do hereby certify that ——— [the witnesses before named] were by me sworn [or affirmed], to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions, by them respectively subscribed, were truly reduced to writing by me [or by ——— a disinterested person, in my presence]: and that the same were taken at the time and place specified in the enclosed notice. [Dated and signed, with official seal, if there be one].

(b) *Form of a dedimus potestatem.* The State of ———, County of ———, Court of ———. To ———. Know ye that we, confiding in your prudence and fidelity, have appointed you to take the depositions of witnesses in a certain cause pending in our said court, wherein ——— is plaintiff, and ——— is defendant; and there-

Presumptive and circumstantial evidence. (a) This consists of *inferences* drawn from *facts* proved in some one of the foregoing ways, that other facts exist. This kind of evidence is often of the most conclusive character. When an act has been done, proof that the defendant was in a condition and had motives to do it, makes it highly probable that he did do it; and if further proof be added, that no other person was in a condition to do it, the conclusion is nearly irresistible. Indeed there are certain presumptions, which by reason of their general recognition, have been called *presumptions of law*. Thus a receipt for the rent of the last year, raises a presumption that the rents of the preceding years have been paid. Long and undisputed possession of land, raises a presumption of rightful ownership. The omission to produce written evidence within one's power raises a presumption that such evidence if produced would operate unfavorably. The detection of one falsehood in a witness raises a general presumption against his veracity. Good character and sanity are always presumed. The continuance of things in their existing state is always presumed. Thus where there is uncertainty, the life of a person rather than his death is presumed; but this presumption ceases at the end of seven years after he was last heard from. Where parties have long acted as husband and wife, a legal marriage is presumed, and children of the wife are presumed to be children of the husband. In legal proceedings generally, all things are presumed to have been regularly done. These examples sufficiently illustrate the nature of circumstantial or presumptive evidence, as distinguished from positive. When an inference or presumption is thus raised it makes what is called a *prima facie* case; that is, such a case as calls upon the adversary for rebutting testimony. The rule is that the party having the affirmative of the issue, must offer his testimony first, and until he makes a *prima facie* case, the other party has no occasion to answer him. But I cannot further pursue the subject of evidence; enough has been said to give you some general ideas respecting it, and this is all I proposed to myself. Meantime there are certain incidents, liable to occur during the trial, which require a brief notice.

fore we command you that at certain times and places to be appointed by you, the said parties or their agents having ——— days' notice thereof, you cause such witnesses as may be required on either side, to come before you, and then and there examine each of them on oath or affirmation first taken before you; and that you reduce such examination to writing, and return the same, together with this commission, closed up under your seal, into our said court with all convenient speed. [Conclusion as in writs].

If interrogatories have been filed, the commission varies from the above, in omitting notice to the parties, and requiring the witnesses to be examined upon such interrogatories. The return or certificate of the commissioner, states the time, place, and manner of executing the commission, so as to show that it has been fully obeyed.

(a) See Matthew on Presumptions; Wells on Circumstantial Evidence.

Incidents during trial. The more important incidents liable to occur during the trial, are as follows :

Nonsuit. When the plaintiff fails to make out a case, either because his evidence is incompetent, or irrelevant, or insufficient, he must either be nonsuited, or have a verdict rendered against him. If he intends to appeal, it makes little difference which ; for in either case he must pay the costs, and our law allows an appeal in either case ; but if not, he will prefer a nonsuit, because this does not hinder him from commencing another action for the same cause. There is however an arrangement, by which both consequences may be avoided, and the cause continued in court ; and that is *by withdrawing a juror* ; which, by preventing the possibility of a verdict, places the cause back in the same condition as before the trial commenced. It is of course a matter of compromise with the parties, under leave of court.

Bill of exceptions. The object of a bill of exceptions is to make that a matter of record, which otherwise would not be, for the purpose of a *writ of error*, to be described hereafter. Now the *interlocutory opinions* of the court during the trial, are not regularly recorded. If, therefore, either party thinks the opinion of the court wrong, in admitting or overruling testimony, or directing a nonsuit, or instructing the jury, or allowing or refusing a new trial, he may tender a bill of exceptions, pointing out the facts and error ; which bill the court are required to sign and seal ; and it thereby becomes a part of the record. This step is only taken for after use, and does not stay the proceedings at the trial. (a)

Demurrer to evidence. The verdict of a jury may either be *general*, simply finding the issue for one party or the other, and thus concluding both the law and fact ; or it may be *special*, setting forth the facts proved, and leaving the law arising thereon, to the court. Now the jury cannot be compelled to render the one or the other as may be desired ; but may, by our law, have their option. Accordingly, if either party is willing to admit the *truth* of the testimony offered, and wishes to refer its *effect* at once to the court, so as to avoid a general verdict, he may *demur to the evidence* ; which is thereupon reduced to writing, and entered like a special verdict, on the minutes of the court, for future argument. (b)

(a) *Form of a bill of exceptions.* Be it remembered that on the trial of a certain action of ———, wherein ——— was plaintiff, and ——— was defendant, in the court of ———, at the ——— term, the said ——— to maintain the issue on his part, offered to prove that [here describe particularly the testimony offered] ; to the admission of which testimony the said ——— objected ; which objection was overruled by the court, and the said testimony was excluded ; to which opinion of the court the said ——— excepted, and prayed the court to sign and seal this bill of exceptions, which is accordingly done, and the same is ordered to be made part of the record. [Signed and sealed by the judges].

(b) *Form of a demurrer to evidence.* This day came the said parties by their

Arguments of counsel. When the testimony is closed, the cause is argued to the court and jury, by the counsel, not exceeding two on each side. The party on the affirmative of the issue has the opening, the adversary follows, and the opening counsel closes.

Charging the jury. When the arguments are closed on both sides, it is the province of the court to charge or instruct the jury on the points of law presented by the facts of the case. This is done as a matter of course, if there be any dispute about the law; and either party may move for particular instructions; the granting or refusing of which by the court, if erroneous, may be taken advantage of by a bill of exceptions. A sense of propriety does usually, and should always prevent the court from intimating any opinion upon the weight of evidence; and on the other hand, a similar motive should induce the jury to take the law as laid down to them by the court. The theory of judicial proceedings requires these two functions to be kept entirely distinct. In practice, however, they are liable to be more or less confounded. Judges, in particular, are apt in their charge to sway the minds of the jury, by opinions upon the evidence; but this is as clearly an usurpation, as it would be for the jury to undertake to decide upon the law. In some of the states the charge of the court is required to be reduced to writing and read to the jury, who take it with them to their room; and it afterwards remains on file among the papers in the cause. Many obvious advantages result from this provision; and perhaps it would be well if it were made universal.

Verdict. (a) The jury being thus in possession of the case, retire for deliberation, under the charge of an officer, who is sworn not to allow them to hold intercourse with any one or take any refreshment, without leave of the court. It is a singular provision, and perhaps in civil cases an unwise one, as before observed, that all the jurors must agree in order to find a verdict. Those who reflect how rare it is to find *absolute unanimity* among men on any point of controversy, will not wonder that jurors very frequently disagree as to a verdict. When this is the case, and there

attorneys, and thereupon came a jury, to wit, [give the names of the jurors], who being empannelled and sworn the truth to speak upon the issue joined between the parties, the said plaintiff, to maintain the issue on his part, showed in evidence that [set forth fully the testimony demurred to]; and the said defendant says that the aforesaid matters to the jury shown are not sufficient in law to maintain the issue on the part of the said plaintiff; and this he is ready to verify; wherefore he prays judgment, and that the jury may be discharged from giving any verdict; and that the said plaintiff may be barred of his action. [Signed by the attorney].

The *joinder* is as follows:—And the said plaintiff, because he has shown sufficient evidence to maintain the issue on his part, which the said defendant does not deny nor answer unto, prays judgment and his damages. [Signed by the attorney].

The jury are then instructed to assess the damages, in case the judgment should be for the plaintiff, and return their verdict subject to the opinion of the court on the demurrer.

(a) See 3 Black. 375.

is no prospect of coming to an agreement by further deliberation, instead of starving them into unanimity, as was formerly done, the court order them to be discharged; and the cause remains for trial at a subsequent term, as if none had taken place. But when, on the other hand, they have agreed upon their verdict, they come into court and declare it, before separation, unless the court with consent of counsel give permission to seal it up, and then separate. In this case they either hand it to the clerk or one of the judges, or bring it in themselves at the next opening of the court. We have seen that it may be *general* or *special*, (a) at the option of the jury; and it must assess the damages, if the case require it. The court may correct it in point of form, but cannot change the substance. It is delivered or declared by the foreman, and any juror may then express his dissent, but not afterwards. Sometimes also a party is permitted *to poll* the jury, that is, to ask each juror if he assents to the verdict, but this is not a matter of course. Jurors are not now punishable, as formerly, for finding a false or corrupt verdict, unless their misconduct amounts to a contempt. We shall see, however, that there are ways provided for avoiding the effect of a wrong verdict, for which purpose a discretion is lodged in the court; but in the mean time the verdict is entered on the journal of the court, and the jury are discharged, so far as relates to the case in hand.

Incidents after verdict. (b) In the regular course of proceeding, the next step is to pronounce *judgment*. But between the verdict and the judgment, certain steps may be taken to prevent the judgment, which are now to be described.

New trial. If the party against whom the verdict is, has sufficient cause, he may move for a new trial, and the court will hear argument upon such motion; but not more than two new trials will be granted in the same cause. The reasons of a new trial, which must be filed with the motion, are such as do not appear on the record, unless by a *bill of exceptions*; namely, where the court misdirect the jury; where evidence has been rejected or admitted contrary to law; where the verdict is against law, or against evidence, or on insufficient evidence, or gives excessive

(a) The form of a *special verdict*, as it appears in the final record is as follows:—This day came the parties by their attorneys, and thereupon came a jury, to wit, [names of the jurors], who being empannelled and sworn to speak the truth upon the issue joined between the parties, upon their oaths did say, [set forth the facts in their own words]; and if upon this finding the judgment ought to be for the plaintiff, then the jury assess his damages at ——— dollars; but if for the defendant, then they find accordingly.

Thus the question of law is wholly submitted to the court who hear argument thereon. The form of a *general verdict* must correspond with the issue to be tried, and is commonly in the very words of the issue. Thus on the issue of *nil debet*, after the foregoing introduction—That the defendant does owe to the plaintiff the sum of ——— dollars in manner and form as the plaintiff has declared; and they assess his damages by reason of the detention of the said debt to ——— dollars.

(b) 1 Swift's Dig. 774.

damages; where the jury have behaved improperly; and where a new and material fact has been subsequently discovered, which might change the verdict. Sometimes also a *venire facias de novo* is awarded, which has the same effect. The result is, that the former verdict is set aside, and the cause stands for trial as if none had taken place.

Arrest of judgment. The party aggrieved may next make a motion in arrest of judgment, and the court will hear argument upon it. Judgment can only be arrested on account of some error appearing on the face of the record, and which might have been ground for demurrer. It must be an error in substance, and not merely in form, and may occur any where in the proceedings. If this motion prevail, no judgment is entered on the verdict, but the party making it has judgment in his favor.

Judgment non obstante. There is one case also, in which the proper motion is for judgment notwithstanding the verdict; namely, where the defendant has put in a defective plea of confession and avoidance, and yet obtained a verdict. Here, the plaintiff's case being confessed by the plea, and the defence or matter in avoidance being insufficient, the verdict must, of course, be wrong; and judgment is properly rendered the other way.

Repleader. It sometimes happens that parties make up an *immaterial issue*, that is, an issue which being found either way, will not decide the cause. Whenever this state of pleading is discovered, the court will direct the parties to plead again, that a proper issue may be made.

§ 213. *Judgment.* (a) In the regular course of judicial proceedings, we have now reached the point at which the court pronounce the sentence of law upon the case presented, and which is called the judgment. A judgment is said to be *interlocutory*, when it does not fully terminate the controversy, and *final*, when it does. In general, the judgment is not pronounced in so many words from the bench, but its nature being intimated by the court, the clerk enters it on the journal in due form. From that moment it carries on its face such absolute verity, that while it stands unreversed, nothing can be received to contradict or gainsay it. To avoid all questions about priority, it takes effect from the first day of the term. Of itself it is, by our statute, a lien upon all real property of the defendant within the county; and by levy of execution it becomes a lien upon any other property. With the exception of ejectment for reasons before given, it is a conclusive bar to all further litigation between the same parties, touching the same subject-matter. Within the state, the plaintiff may take out execution to carry it into effect at any time, unless he suffer an

(a) For the nature and various kinds and forms of judgments, see 3 Black. chap. 24; Steph. on Plead. 138—145. By the common law judgment did not operate as a lien until execution was levied. And the time of becoming dormant, without execution, was a year and a day, after which it must be revived by *scire facias*.

interval of five years to elapse without so doing; in which case the judgment becomes *dormant*, (a) that is, it ceases to operate as a lien, or to authorize execution, until revived by an action of *debt* or *scire facias*. If several judgments be recovered against the same debtor, at the same term, and executions be taken out within ten days after the end of the term, there is no preference or priority; but otherwise the first execution has the preference, unless two or more be issued on the same day. If execution be not taken out within one year from the rendition of judgment, it loses its priority of lien with respect to subsequent judgments complying with this rule. If execution have been levied upon so much of the property of the debtor, that two thirds of the appraised value will satisfy the debt, the lien of that judgment ceases upon the residue of his property, with respect to other judgment creditors. Several decisions have been made upon these provisions, the most important of which are, that if there be several judgments of the same term, and no levy within the year, they all stand upon an equal footing, and the first levy will have the preference; but if of different terms, the elder judgment still retains the preference; that when the title of the debtor was acquired after the judgment, the lien does not attach until levy; and that the lien does not in any case attach to an equitable title. In any other state or territory of the Union, though a judgment neither operates as a lien, nor authorizes execution, yet a mere exemplification of the record, according to the act of Congress, forms the highest possible evidence of debt, because the original merits of the case cannot be called in question; and in the action of debt brought to carry it into effect, the only issue is upon the record itself. Such then is the effect of a judgment, unless suspended by an *injunction*, which will be described hereafter, or superseded or reversed by an *appeal* or *writ of error*, which are now to be described. (b)

(a) Whether the fact of execution being stayed by injunction will prevent the judgment from becoming dormant, query. See *Lytle v. Cin. Man. Co.* 4 Ohio, 459; *Winter v. Lightbound*, 1 Strange, 301; *Mitchell v. Cue*, 2 Burr. 660.

(b) Strictly speaking, there are but two general forms of judgment, namely, for the plaintiff, and for the defendant. For the plaintiff the form is:—Therefore it is considered by the court that the plaintiff recover of the defendant the said sum of _____ dollars, his damages aforesaid assessed, and also his costs in this behalf expended, taxed to _____ dollars. For the defendant the form is:—Therefore it is considered by the court that the defendant go hence without day, and recover of the plaintiff his costs in this behalf expended, taxed to _____ dollars. But unless these judgments are rendered directly upon a verdict, they are always prefaced by the circumstances under which they are rendered. For example, a *judgment by default* would be entered thus:—This day came the plaintiff by his attorney; and the defendant, though solemnly called came not, but made default; whereupon it was considered by the court that the plaintiff ought to recover his damages by reason of the premises; and no jury being demanded, and the court being fully advised in the premises, did assess the damages to _____ dollars. Therefore it is considered, &c. And a *judgment confessed under a power of attorney* would be entered thus:—This day came into court _____ by _____ his attorney, and filed his declaration against _____; and thereupon, _____, one of the attorneys of this court, appeared on behalf of the said _____, and by virtue of a

Appeal. The nature of appellate jurisdiction has been already explained. An appeal lies only after the rendition of final judgment in the court below. Notice of intention to appeal must be given during the term, and entered on the journal; and within thirty days after the end of the term, the appeal thus notified, must be perfected. This is done as follows:—The appellant enters into a bond to the appellee, with such security as the clerk shall approve, in double the amount of the judgment, conditioned for the payment of the judgment and costs in the court above, if the same be against the appellant. The clerk then makes out a transcript of the proceedings, and delivers it, with all the papers in the cause, to the clerk of the court above. The whole case, including questions of law and fact, is thus removed for rehearing, and stands for trial in the court above, in the same manner as if it had been commenced there originally. The judgment, however, in the court below, is not absolutely vacated by the appeal, for it still operates as a lien upon the real estate of the judgment debtor; but all proceedings to enforce it are in the mean time suspended; and it becomes finally merged in the judgment rendered above. You will remark that it is often for the interest of the prevailing party that his cause should be appealed; because he thereby obtains absolute security for the satisfaction of the judgment. Moreover, the abuse of the privilege is guarded against, by penalties, where the only objection is delay.

Writ of error. This proceeding is designed to bring up *questions of law* only, for revision in the court above. At any time within five years after rendition of judgment, if there be substantial errors on the face of the record, a party may apply to the court above, or to one of the judges thereof, for the allowance of a writ of error. For this purpose, a certified transcript of the record below, is procured from the clerk, and the alleged errors are thereon specifically assigned or pointed out. The allowance of the writ, by the judge or court above, is matter of discretion. If it be allowed, the fact is endorsed by the judge or clerk on the transcript presented. This is handed to the clerk of the court above, who thereupon issues the writ of error, commanding the judges below to certify up the proceedings. At the same time a *citation* issues to the adverse party that he may appear and attend to his interest. The party applying for the writ is denominated the *plaintiff in error*, and the other, *defendant in error*. If the judgment below is to be *superseded*, the plaintiff in error must

power of attorney for that purpose, duly executed by the said ———, and now produced in court and duly proved, did waive the issuing and serving of process, and did acknowledge that the said ——— did owe the said plaintiff, [or did assume and promise], in manner and form as the said plaintiff has declared; and did confess that the said plaintiff has sustained damages by reason thereof to \$——. Therefore it is considered, &c. And by virtue of the said power of attorney all error is released, and the right of appeal waived. [Signature of the attorney on the journal].

give bond, as in case of appeal; and then the judgment below will merely operate as a lien; but otherwise it will remain in full force for all purposes until reversed above. Our present law allows proceedings to be amended even after a writ of error. If, therefore, the defect be such as an amendment will cure, there is no use in resorting to a *writ of error*. A writ of *certiorari* is analogous to a writ of error; but it issues from a higher court to any lower court, whether of record or not; and at any stage of the proceedings, as well before as after judgment. The writ of error now described is called a writ *coram vobis*, to distinguish it from one *coram nobis*, by which the highest court revises its own decisions. We have a statutory provision for both these writs. The principle is, that errors are to be corrected whenever discovered. (a)

§ 214. *Execution.* (b) If execution be not prevented in one of the ways before described, it may be ordered out by a *precipe*, at the pleasure of the party interested. Execution may either be against the *person* or *property* of the judgment debtor. 1. The writ against the person is called a *capias ad satisfaciendum* or *ca. sa.* It can only be obtained under the circumstances and by means of the preliminary steps, before described for procuring a writ of *capias ad respondendum*, together with the order of the court or judge. It commands the sheriff to take the body of the judgment debtor, and hold him in custody, until he satisfies the judgment, or is otherwise legally discharged. Accordingly, when

(a) *Form of a writ of error.* To the Judges of the Court of — within and for said county. Because in the record and proceedings in a certain action of —, which was lately in our said court before you, wherein — is plaintiff, and — is defendant, error has intervened, as is said, to the damage of the said —, and we being willing that such error, if any there be, should be corrected, and full and speedy justice done in the premises, do command you, that if judgment be thereupon given, then without delay you send to us, under the seal of your court, an authenticated transcript of the record and proceedings aforesaid, together with this writ; so that, the same being inspected, we may, at the next term of our supreme court to be holden at —, on —, cause to be done, what of right ought to be done.

Assignment of errors. And the said — now comes and says that in the record and proceedings aforesaid there is error in this, to wit: 1. That, &c., [specifying each of the errors separately]. Wherefore the said — prays that a citation [and a supersedeas if bond be given] may issue, that the said judgment may be reversed, and that he may be restored to all things which he has lost by reason thereof.

Supersedeas and citation. We command you that you forbear all further proceedings upon a judgment [describing it] which judgment we have caused to be brought into our supreme court by writ of error; and also that you cite the said — to appear before our said court, at —, on —, to show cause, if any there be, why the said judgment should not be reversed; and have you then and there this writ with your doings thereon.

Joinder in error. And the said — comes and says, that in the record and proceedings aforesaid there is no error; wherefore he prays that the said judgment may be affirmed, and that his costs may be adjudged to him.

If a defective transcript be returned from the court below, upon a suggestion of that fact specifying the defects, the court will issue a *certiorari*, commanding the court below to supply the defects.

(b) See 1 Swift's Dig. b. 3, chap. 26; 3 Black. ch. 26.

arrested on this writ, he must either pay the judgment, or take the benefit of the insolvent act, or go to jail, where he may have the benefit of prison limits; all of which have been sufficiently described; and the general doctrine is, that an arrest upon this writ, which is the highest remedy known to the law, precludes a resort to the other, whether it result in satisfaction or not. But this is altered by our statute, where one who has property takes the benefit of prison limits. (a) 2. The writ against the property is called a *fieri facias et levare facias*, or *fi. fa. et lev. fa.* It is properly a combination of two writs, the *fi. fa.* being directed against personal property, and the *lev. fa.* against real property. It commands the sheriff to cause the amount of the judgment to be made first out of the personalty of the debtor, and for want thereof, out of his realty. Accordingly, if the sheriff can find no personal property, he endorses on the writ "*no goods*," and proceeds to *levy* upon the land. When goods are levied upon, they are sold at public auction, without appraisement, unless the judgment debtor demand it, on ten days' notice: and there are a few articles of small value, including necessary articles of household furniture, and tools or utensils of trade, which are specially exempted from execution, under all circumstances; but I shall not take up time with enumerating them. When land is levied upon, it must be *appraised* by three disinterested persons under oath; the notice must be thirty days; and the land cannot be sold for less than two-thirds of its appraised value, lest the judgment debtor should be injured by a sacrifice. The mode of proceeding in the sale of land has been sufficiently described in a former lecture. If the judgment debtor have no property, personal or real, which can be levied upon, special provision is made for a proceeding in chancery against the debtor's *unleviable* means, which will be described hereafter. (b)

(a) *Form of a ca. sa.* We command you that you take ———, and him safely keep, so that you have his body before our court of ——— on the first day of their next term, to satisfy ——— for the sum of \$——, which by the judgment [or decree] of our said court at their ——— term, in the year ———, one ——— recovered against the said ———, together with interest thereon from ——— [date of judgment or decree]; and have you then and there this writ with your doings thereon.

(b) *Form of a fi. fa. et lev. fa.* We command you that you cause to be levied of the goods and chattels of ———, the sum of \$——, which by the judgment [or decree] of our court of ———, at their ——— term in the year ———, one ——— recovered against the said ———, with interest thereon from ———; and for want of goods and chattels, that you cause the same to be levied of the lands and tenements of the said ———; and have that money before our court of ———, on the first day of their next term to render unto the said ———; and have you then and there this writ with your doings thereon.

If goods or lands remain unsold for want of bidders, or other cause, the *venditioni exponas* is as follows:—We command you that those goods and chattels [or lands and tenements] of ———, which you, according to our command, lately took into your hands, and which remain unsold, you expose to sale, to satisfy, &c., [describe judgment as above].

In ejectment the execution, in addition to the collection of damages and costs, orders

Costs. The judges are compensated, as we have seen, by salaries paid out of the public treasury: but the other officers of court, together with the jurors and witnesses, are compensated by specific fees, prescribed by law; and these fees constitute the *costs of court*; which the suitors are required to pay. The theory is, that each party pays his own costs as they accrue, for each particular service rendered: and it would be well to enforce this in practice; because much frivolous litigation would be thereby avoided: but instead of this, costs are seldom paid until the final termination of the suit. In either case, the general rule is, that they ultimately fall upon the losing party, as a regular incident to the judgment. If, therefore, they have been paid as they accrued, the winning party recovers his part back, together with the damages; if not, the whole are collected on execution from the losing party, together with the damages: so that in either case, the loser pays the whole if he has the means; if not, the winner must pay his part, and the officers must lose the rest, as a just punishment for not demanding them on rendering the service. We have seen, however, that in the course of proceedings, divers interlocutory orders are made, in which the payment of certain particular costs by one of the parties, is made the condition upon which some privilege, as amendment, continuance, and the like, is allowed by the court: but these are only exceptions to the general rule before stated.

Complete record. (a) After the final termination of a suit in

the plaintiff to be put in possession of the land. This is called a writ of *haberi facias possessionem*, and is as follows:—Whereas John Doe on the ———, in our court of ———, recovered against ——— his term yet to come in [describe the premises], which ——— had demised to the said John Doe, for a term not yet expired; and also the sum of \$—— for his damages, and \$—— for his costs: therefore we command you, that without delay you cause the said John Doe to have possession of his said term yet to come in the lands and tenements aforesaid; and that you cause to be levied, &c. [as before].

(a) *Form of a record.* Pleas before the court of ———, within and for the county of ———, and state of ———, on the ——— [date of the final judgment]. Be it remembered that heretofore, to wit, on the ———, one ——— sued out of the clerk's office of the court aforesaid, the following writ of ———, against one ———, to wit: [here copy the writ]. Upon which writ was the following indorsement, to wit: [here copy the indorsement]. And afterwards, to wit, on the ———, the said writ was returned to the court aforesaid by said sheriff, indorsed as follows, to wit: [here copy the return]. And afterwards, to wit, on the ———, the following recognizance of special bail was entered into, to wit: [here copy the recognizance]. And afterwards, to wit, on the ———, the said ——— filed in the said clerk's office the following declaration, to wit: [here copy the declaration]. And afterwards, to wit, on the ———, the said ——— filed in the said clerk's office the following plea, to wit: [here copy the plea]. And afterwards, to wit, on the ———, this cause was continued until the next term of said court. And afterwards, to wit, on the ———, before the said court, came as well the said ——— as the said ———, by their attorneys aforesaid, and thereupon came a jury, to wit, [here give the names of the jurors], who being empanelled and sworn the truth to speak upon the issue joined between the parties aforesaid, upon their oaths did

any court of record, it is the duty of the clerk, during the next vacation, to make a complete record thereof in a book prepared for that purpose, which is signed by the presiding judge at the next term. This record includes the writ, return, recognizance of bail, pleadings, orders, continuances, verdict and judgment, which are copied in the order of proceeding, and furnish a complete history of the cause, with the exception of the evidence: and even the evidence, or some part of it, may be spread upon the record, by means of a bill of exceptions, special verdict, or demurrer to evidence. The object of making this record is to preserve a perpetual memorial of judicial proceedings, in a form convenient for public inspection. If the record exhibit anything to show that the judgment is erroneous, we have seen that the error may be corrected by taking the proper course. But the truth of the facts therein contained cannot be called in question; the record itself furnishing the highest possible evidence of verity. We have seen that justices of the peace keep no record, strictly so called, but only a docket. In fact the proceedings before them are attended with little formality or technical precision; and for this reason I have not thought it worth while to describe them. Here then would terminate our imperfect outline of civil proceedings in courts of law; but that there remain two topics, of great practical importance, which I shall discuss briefly, as a proper conclusion to this lecture. I mean the *survivorship of actions*, and the *limitation of actions*. I would previously remark, however, that the subjects already discussed in this lecture will necessarily occupy a very wide space in your future inquiries. Perhaps I should be safe in saying that at least one half of all the learning of a lawyer has reference to practice, pleading, and evidence; three topics, upon which more volumes have been written than I have occupied pages. And I would also remark, that one of the most useful exercises in which a student can engage, is that of making for himself a complete record of all the proceedings in the various actions, and repeating the operation until he becomes perfectly familiar with all its parts.

§ 215. *Survivorship of actions.* This topic though highly

say that [here set forth the verdict]. And thereupon it was considered by the said court that the said ——— [here set forth the judgment].

The *certificate of the clerk* is as follows:—The state of ———, county of ———. I hereby certify that the foregoing is truly taken and copied from the records of the proceedings of the court of ———, within and for the county aforesaid. In testimony whereof I do hereto subscribe my name, and affix the seal of said court, this ———. [Signature of clerk and seal of court].

If this record is to be used in another state, there must be another certificate by the presiding judge, as follows:—I ——— [giving his official designation], do hereby certify that ——— is clerk of said court, and that his attestation aforesaid is in due form of law; and that to all acts by him so done full faith and credit ought to be given. [Date and signature of judge].

important, is no where, so far as I know, made a distinct title, in the books of practice. An action or a right of action is said to *survive*, when, upon the death of the original parties, it can be commenced or concluded, by or against their representatives.

As to actions of contract. It was a maxim of the civil law, that personal actions die with the person; but by *personal actions* were here meant *actions of tort* only, and not *actions of contract*; and in this sense, the maxim agreed with the ancient common law, which held that actions of contract alone survive. But it is obvious that this ancient doctrine has little foundation in reason. With respect to *crimes*, it is easy to see that the death of the offender must be a bar to punishment; but if a man has done me a *civil injury*, for which the law entitles me to pecuniary damages, why should I not have them out of his property after his death, as well as if the same amount had been due me by contract? It is evident that there is no good reason for the distinction; but we shall be less surprised at this distinction, when we learn that it cost the English courts a struggle of nearly a century, to establish the doctrine that any actions of contract survive, except those on contracts under seal, where survivorship both ways, is generally one of the express stipulations. At length, however, in 1610, the controversy was finally settled, by an unanimous decision of the house of lords, that simple contracts survive both ways, to the same extent as sealed contracts; though there be no express stipulation with respect to the survivorship. Since that period, it has not been doubted that all actions of contract survive, with respect to both parties; with the single exception of such contracts, as a promise to marry, and the like, which can only be performed by the individuals contracting, and not by their representatives. (a)

As to actions of tort. The first and leading case, which overthrew the ancient rule as to actions of tort was that of *Humbly v. Trott*, (b) decided by Lord MANSFIELD. The principles there laid down, were in substance as follows. Where the cause of action is a tort, which produces no gain to the party committing it, as slander, for example, the action dies on account of the cause; where the form of action is such that the declaration must allege force and arms, as in trespass, or the plea must be that the testator was not guilty, the action dies on account of the form; and all other actions of tort survive. This case relates to the defendant only. With respect to the plaintiff, there was an ancient English statute, giving to the executor an action of trespass for the goods of his testator, carried away in his lifetime. This

(a) See the Year Books, 12 H. 8, p. 11; 27 H. 8, p. 23; 4 Reeve's H. C. L. 383; Norwood v. Read, 1 Plowden, 180; Pinchon's case, 9 Coke's Rep. 86; Chamberlain v. Williamson, 2 M. & S. 408; Stebbins v. Palmer, 1 Pick. 71.

(b) See *Humbly v. Trott*, Cowper, 872.

statute has been generally adopted as common law in this country, and by an equitable construction, has been held to embrace all injuries to personalty. (a) But these doctrines with respect to actions of tort, are so far modified by our statute, that here all actions of tort survive both ways, except those for injuries to the person, health, or reputation, which produce no gain to the party committing the tort; and this seems to be the plain good sense of the matter.

At common law, even where a cause of action would itself survive, yet if the action were pending at the death of either of the parties, it would in all cases *abate*, and a new action must be commenced. This was productive of needless delay and expense; and accordingly our statute provides that no action shall abate by the death of either of the parties, except those, the cause of which does not survive. If therefore one of the parties die, during the pendency of an action, and his representatives do not of their own accord come in to prosecute or defend such action, a citation issues to bring them in; and if they still neglect to appear, a judgment of nonsuit or default is rendered, as the case may require. Also if there be two or more plaintiffs and defendants, and one of them die, his death is suggested on the minutes; after which the suit goes on to judgment, and his representatives are made parties thereto, by a writ of *scire facias*. The only question then is, who are the representatives of the deceased? In all strictly personal actions, having no reference to the title to realty, the executor or administrator is the legal representative, and is made party to the suit; but in the action of ejectment, and in all actions on covenants real running with land, the heirs or devisees, are the legal representatives, and are made parties accordingly. It will thus be seen that on the subject of survivorship, our law is peculiarly simple and reasonable.

§ 216. *Limitation of actions.* (b) Statutes of limitation have been well denominated *statutes of repose*. They proceed upon the maxim that legal rights should be asserted within a reasonable time; and that the law should favor the vigilant, and not the sluggish; but the common law fixed no precise time within which actions must be brought. This is every where done by statute; and such statutes are called statutes of limitation. They have been found to be so highly expedient, that courts of chancery, though not always within their letter, have been uniformly governed by their spirit. (c) I shall of course confine my remarks

(a) See *Berwick v. Andrews*, 2 Lord Raym. 971; *Salk*. 314; *Wheatly v. Lane*, 1 Saund. 216; *Griswold v. Brown*, 1 Day's Cases in Error, 180, *Holmes v. Moore*, 5 Pick. 257.

(b) See the American treatise of Angell, and the English treatises of Ballantyne, Blanchard, and Wilkinson.

(c) *Bigelow's Exr. v. Bigelow's Admr.* 6 Ohio, 96; *Tuttle v. Wilson*, 10 Ohio, 24; *Fahs v. Taylor*, 10 Ohio, 104; *Ridley v. Hettman*, 10 Ohio, 524.

to our own statute. But all the American statutes of limitation are much alike, being copies, more or less exact, of the same original, namely, the English statute of limitations. And the federal courts are uniformly governed by the statutes of limitation of the state where the cause of action accrued, and by the constructions thereof given by the courts of such state. (a)

Periods of limitation. Our statute divides actions with reference to the periods of limitation into seven classes, which are limited as follows: 1. Ejectment, to twenty-one years. There is an exception, however, by our statute, in the case where land has been sold by an executor or administrator under an order of court; in which case no action can be brought by any person claiming under the deceased, after five years from the sale; or in case of disability, five years from the removal thereof. 2. Forcible entry and detainer, to two years. 3. Actions upon any written contract, whether under seal or not, to fifteen years. 4. Actions upon any contract not in writing, and actions on the case for consequential damages, to six years. (b) 5. Actions of trespass upon property, real or personal, and actions of trover, detinue, and replevin, to four years. 6. Actions for personal injuries, including assault and battery, libel, slander, malicious prosecution, and false imprisonment; actions for official misconduct; and *qui tam* actions, or, actions for penalties, where the informer has one half, to one year. 7. All other actions, not included in the above classes, to four years.

Commencement and termination of the time. (c) The limitation begins from the time "*when the cause of action accrued.*" Generally speaking, this means, when the right of action is perfect; and it makes no difference whether the party was then aware of his right of action or not; for it is the happening of the event upon which the right of action is founded, and not the discovery of the right resulting from the act, which fixes the commencement of the limitation. Thus, in ejectment, for example, the cause of action accrues, and the time begins to run, when *adverse possession* commences. So long as the occupant of land acknowledges the right of the owner, there is no cause of action against him; but from the moment when, in word or act, the occupant denies the owner's title, and claims to hold adversely to him, the cause of action has accrued, and the twenty-one years have commenced running. Again the words of the statute are:—"all actions hereinafter mentioned, shall be *commenced* within

(a) Harpending v. The Dutch Church, 16 Peters, 455.

(b) Williams v. Williams, 5 Ohio, 445.

(c) Kerns v. Schoonmaker, 4 Ohio, 331; Williams' Admr. v. Williams' Admr. 5 Ohio, 444; Payne's Lessee v. Skinner, 8 Ohio, 159; Abram's Lessee v. Will, 6 Ohio, 164; Wallace's Lessee v. Miner, 6 Ohio, 366, and 7 Ohio, 249; Monroe's Lessee v. Morris, 7 Ohio, 262; Thompson's Lessee v. Gotham, 9 Ohio, 170; Hunt's Lessee v. Guilford, 4 Ohio, 310; Rowland v. Rowland, 8 Ohio, 40; Fee v. Fee, 10 Ohio, 469.

the several times hereinafter limited;" and an action is *commenced* or is *pending*, when the process has been *served*, or if the notice is by publication, when the publication has been completed. If the action be commenced a moment before the limitation expires, it is saved; for the statute provides that if it should abate, or the plaintiff be nonsuited, or judgment be arrested or reversed, the plaintiff shall have one year more within which to commence a new action.

Saving clause. (a) When any cause prevents the statute from operating in a given case, it is said to take the case out of the statute. For example, an agreement to submit a question of boundary to arbitration, takes the case out of the statute, because by admitting a doubt in which party the right lies, it negatives the idea of a positively adverse possession. But there are certain general causes which, by express provision, take all cases out of the statute, on the ground that the parties affected by them have sufficient reason for not asserting their claims in the usual time. These causes pass under the general name of *disabilities*; and the clause providing for them is called the *saving clause* of the statute. In our statute they are now four, namely, *infancy*, *coverture*, *insanity*, and *imprisonment*. These disabilities are personal privileges, and protect only the person laboring under them; so that if one heir be within the saving clause, this does not help his co-heirs, who are not within it. In England and in most of the states, there is a fifth, namely, "*being beyond seas*," which, in this country, means being *out of the state*. (b) This was in our statutes of 1804 and 1810; our statute of 1824 substituted the expression, "without the United States;" but the present statute of 1831 omits it altogether. By inadvertence, however, as it would seem, in one of our special limitations requiring wills to be contested within two years, being without the state still remains a saving disability. In all cases except ejectment, if a party, at the time his cause of action accrued, was under either of the aforementioned disabilities, he has the full period of limitation, after the removal of his disability, within which to commence his action; or, in other words, the statute does not begin to run until the disability is removed: and prior to 1830, this was the case also with respect to ejectment; but now the language of the statute with reference to this action is, "every such person may, after the expiration of twenty-one years from the time his right or title first descended or accrued, bring such action within *ten years* after such disability removed;" and to save existing rights, there is a temporary provision, that when a disability

(a) *Thompson's Lessee v. Gibson*, 2 Ohio, 339; *Starke's Lessee v. Smith*, 5 Ohio, 455; *Moore's Lessee v. Armstrong*, 10 Ohio, 11; *Bronson's Lessee v. Adams*, 10 Ohio, 135.

(b) *Richardson v. Richardson*, 6 Ohio, 125; *West v. Hymer*, 7 Ohio, part 2, 235; *Whitney v. Webb*, 10 Ohio, 513.

was removed less than eleven years before this act took effect, there shall still be ten years from that time; but if removed more than eleven years before that date, the time shall be just so much less after. It is unfortunate that the permanent provision above quoted was not expressed in clearer language. One would suppose that the legislature in striking off eleven years from the former period, after the disability removed, would at least have given the remaining ten years, as an absolute extension in all cases; but the language above quoted will not bear this construction. The time given, "after the expiration of twenty-one years," must be "within ten years after such disability removed:" accordingly if the disability ceased at the end of eleven or any less number of years, after the statute commenced running, there would be no extension whatever; for the ten years within which the action must be brought, after the removal of the disability, would run out before or with the original twenty-one years: if the disability ceased after more than eleven years of the original limitation, and less than twenty-one, the extension would be so much less than ten years: but if the disability outlasted the original limitation, then and then only, would there be an absolute addition of ten years. I do not see that the language will admit of any other than this singular construction. Its operation will be best illustrated by an example; and we will take the disability of coverture. Suppose that a claim to land descends upon a married woman, and her husband dies ten years after; now without the saving clause, she would still have eleven years, because every one has that; and since these eleven outlast the ten given by the saving clause, she gains nothing by it. But suppose her husband had lived fifteen years after her claim descended to her; here, without the saving clause, she would have only six years left; but with it, she gains four years. Lastly, suppose her husband had lived thirty years after her claim descended; here she would have an absolute gain of ten years after his death, making in all nineteen.

Cumulative disabilities. (a) From the words "at the time his title first descended or accrued," it follows that the disability, in order to be available, must have been existing at the very time. No subsequent disability can be taken advantage of. If but a day intervene, between the accruing of the cause of action and the disability, the statute having once commenced running, will continue to run. And the same is true, when a subsequent disability occurs, while a prior one still exists; for no disability can be taken advantage of, which did not exist when the statute commenced running; but if several concurrent disabilities existed together at that time, advantage may be taken of that which lasts

(a) Granger v. Granger, 6 Ohio, 35; State of Maryland v. Shipley, 7 Ohio, 246; Whitney's Lessee v. Webb, 10 Ohio, 513.

longest. Thus if a title descends upon a single woman of age, and she marries the next day, her coverture is no saving disability. If she were an infant at the time, her infancy may be taken advantage of, but not her subsequent coverture: but if she was both an infant and married, when her title descended, she may take advantage, either of her infancy or coverture, whichever continues longest. These points are settled beyond controversy. But the language of our statute raises ~~one~~ question of difficulty. Suppose that adverse possession has been running against an ancestor before his death; can his infant heir take advantage of his infancy? or must he bring his action within twenty-one years after the cause of action accrued to his ancestor? The language of the corresponding provision of the English statute is, "at the time *the said* right first descended or accrued;" and this has been construed, in the case proposed, to preclude the infant from setting up his infancy; because, otherwise, in the language of the books, a right might travel down through minorities for centuries. The same reason exists here; and therefore it has been held that the substitution of "his right," in place of "the said right," especially as the word "first," is still retained, is not to be construed as altering the English rule.

Other matters. In the fluctuating legislation of this state, we have had limitation acts passed or amended, in the years 1804, 1810, 1824, 1826, 1830, and 1831. It is important to bear this in mind, because each new act expressly provides that prior causes of action shall be governed by the prior acts, where the contrary is not specified. (a) By a singular omission, the action of *debt on a simple contract* was not limited until the act of 1824. (b) Again, until the act of 1830, there was no provision for the case where a contract was made between parties both residing out of the state. But now our statute refers to the law of the place where the contract was made; and if the action was barred there, it is barred here. (c) Whether the reverse would hold, the statute does not say; but as the general rule is, that the courts of one state will not take notice of the limitations of another state, it is probable that the *lex loci* would be noticed here no further than the statute requires. Many statutes contain an exception in favor of *accounts current* between merchants; but ours does not. The act of 1810 limited actions on *book account* to four years; but in the present act accounts are not mentioned. We have elsewhere a provision limiting the time within which a party may swear to his account, to eighteen months; but this only relates to evidence. Consequently accounts come within the limitation annexed to un-

(a) *Bigelow v. Bigelow*, 6 Ohio, 96; *Hazlett v. Critchfield*, 7 Ohio, part 2, 153; *West v. Hymer*, 7 Ohio, part 2, 235.

(b) *Tupper v. Tupper*, 3 Ohio, 387; *Hazlett v. Critchfield*, 7 Ohio, part 2, 153.

(c) *Headington v. Neff*, 7 Ohio, 229; *State of Maryland v. Shipley*, 7 Ohio, 246.

written contracts; namely, six years. If the account has been closed and the balance struck, the six years begin from that date; otherwise, it would seem, from the date of the last item. (a) We have seen that absence from the state is not now one of the saving disabilities; but this refers to the absence of the plaintiff; for it is expressly provided, (b) that if any person liable to an action resided out of the state at the time the cause of action accrued against him, or removed to any place unknown, during the time limited, the limitation shall begin to run only from the time of his return to the state, or from the time his place of residence within the state becomes known to the plaintiff; and a mere coming into the state clandestinely will not be a *return*, within the meaning of this provision: it must be an open and public return. The chief evil intended to be guarded against by the statute of limitations, is that of prosecuting stale demands, after the proof of payment has been lost. But this evil cannot happen when the defendant has acknowledged the existence of the debt; and accordingly courts have held that an acknowledgment of the debt, and a promise to pay it, take the case out of the statute. Prior to the act of 1830, we had a provision that a *mere demand* by the plaintiff should take the case out of the statute. This was unreasonable, because a mere demand is no proof of the existence of a debt. But now the provision is, that in all cases of contract, when there has been a payment of any part of the principal or interest, or an acknowledgment of indebtedness, or a promise to pay, *within the time limited*, the limitation shall begin to run anew from the time of such payment, acknowledgment, or promise. This provision, you will observe, is confined to the *time limited* by the statute, and thus virtually excludes all beyond that time; otherwise the effect of a promise made after the time might be a matter of doubt. I will only add, that where two or more are jointly liable, a payment, acknowledgment, or promise by one, will bind all, with respect to the statute; and this terminates our view of the statute of limitations. There are some special limitations scattered through the statute book; but they have all been mentioned elsewhere, in connection with the matters to which they refer.

(a) *James v. Richmond*, 5 Ohio, 337.

(b) *Coventry v. Atherton*, 9 Ohio, 34.

LECTURE XXXVIII.

CHANCERY PROCEEDINGS. (a)

§ 217. *Nature of equity.* We are now to trace the course of proceedings in courts of chancery; and here happily there will not be so much occasion for fault-finding, as in the preceding lecture. It would indeed be difficult to devise a system of practice better calculated to answer all the ends of judicial controversy, than the system of chancery practice now in use. It has pre-eminently the merit of reasonableness and simplicity. Though the cases to which its remedies extend, are nearly, if not quite as numerous and diverse, as those of law; yet instead of nine or ten distinct forms of proceeding, it has but one for all cases; and that is founded, and throughout constructed, upon the principles of nature and reason. Fictions are entirely dispensed with, and truth substituted in their place. The parties tell their stories, as men of common sense would tell them, and the court pronounce their decrees in a corresponding style. There is no occasion for the Procrustean system of torturing forms to meet circumstances. Were this system of procedure extended, as it might easily be, to all the matters of civil controversy, whether in law or equity, even leaving the principles as they now are, the benefits of such a reform could hardly be overrated. This is in fact done to a good degree in Louisiana, where the forms of the civil law prevail, and those of the common law are unknown; and I hope the time is not far distant, when something like an approach to a similar improvement will be made here; when the reign of technicality will end, and that of simplicity begin. Such a change would be similar to that which was effected in philosophy by the overthrow of syllogistic reasoning, and the substitution of the inductive method. The origin and nature of chancery jurisdiction were briefly described in the lecture on divisions and definitions. The constitutional provisions conferring this jurisdiction upon the federal and state courts, were also referred to in their proper place; and will again be noticed as occasion may require. Many of the subjects of equity jurisdiction have necessarily been discussed in the lectures on the law of property. But in order to

(a) On the principles of Equity, see the fourth book of Swift's Digest; 3 Black. chap. 27; Story's Commentaries on Equity, and the English treatises of Jeremy and Fonblanque. On chancery practice, see the works of Mitford, Maddock, Newland, Harrison, Cooper, Barton, Blake, Hoffman, Barbour, and Paine and Duer. The four last are American treatises. To which add Story's Commentaries on Equity Pleading, the last and best of all.

render this outline as complete as my limits will permit, after describing the general course of proceedings from the commencement to the termination of a suit, I shall close the lecture with a very succinct enumeration of the principal subjects of equity jurisdiction. In the mean time, however, it may aid our future inquiries, to indicate the points wherein equity differs from law; and to show how far the English chancery system has been adopted in this country.

We have seen that equity does not differ from law, strictly so called, in being less dependant upon positive regulations. Neither does it differ from law with respect to the subject-matter upon which it operates, except in being confined to a narrow range. It is chiefly conversant with *questions of property*, and rarely, if ever, takes cognizance of *crimes* or *civil injuries* strictly personal. In England, though not in this state, as will be seen hereafter, it does differ from law, in being administered by a different court. But the great and radical difference grows out of the *modes of proceeding*; which are so contrived as to ascertain facts and administer remedies, for which the law is incompetent, by reason of the inflexibility of its forms. To illustrate these modes of proceeding will be the chief object of this lecture; but it may be well to remark here that in settling disputed facts, there are the following fundamental points of difference. 1. In chancery proceedings the parties themselves are compelled to testify; and thus truth is often reached without difficulty, when by the rules of law it could not be reached at all. This salutary power of putting the parties upon their oaths is the highest recommendation of the chancery system; and to this, more than to all other causes, is to be ascribed, the growth of equity jurisdiction. 2. In chancery proceedings, oral testimony is not allowed. It must be reduced to writing and placed on file. The expediency of this regulation is more questionable. The advantage which results from observing the tone and manner of a witness, is lost. But on the other hand, the testimony is preserved in a durable shape, and can be examined at pleasure. 3. In chancery proceedings, the *facts*, as well as the *law*, are submitted to the court, without the intervention of a jury. It has been sometimes doubted whether this be not a violation of the constitutional guaranty of the right of trial by jury; but this question cannot arise, where the same constitution which declares this right, also recognizes chancery jurisdiction. Besides, we shall see hereafter, that this court has the power to direct an issue to be made up for a jury, whenever a question arises to render it expedient. 4. When we come to describe the manner in which the parties present their case before the court, and the manner in which the court, by their decree, so shape the remedy as exactly to meet all the circumstances of the case, we shall find a still more striking difference between equity and law; and we shall cease to wonder that the two jurisdictions are kept

entirely distinct. It will then be manifest, that the great object of equity is to supply the manifold deficiencies of law, and that it is admirably adapted to effect this object, as well on account of the flexibility of its forms, as of its almost entire freedom from the fetters of technicality. But a discussion of these matters would now be premature.

In several of the states, as Pennsylvania and Massachusetts, the general chancery system is not adopted. But even there, necessity has required some special chancery powers to be conferred on the courts of law, without which, the administration of justice would be hardly tolerable. Perhaps the erroneous notion, already pointed out, respecting the arbitrary nature of chancery power, has been the cause of this jealous policy. Again, in several other states, as New York and Virginia, the English chancery system is adopted in almost every particular; and full chancery powers are conferred on a single chancellor, who has no common law jurisdiction. But the constitutions of the United States and of this state adopt a sort of middle course. They admit the existence of chancery powers in their full extent; but, instead of creating distinct tribunals to administer them, they require these powers to be conferred, if conferred at all, upon the same tribunals which administer the law. Thus, the same persons officiate both as chancellors and judges; but their modes of proceeding in the two capacities are kept as entirely distinct, as if controlled by different persons. There being a general similarity between these two systems, I shall confine my remarks to the system adopted here. In fact the principles and practice of equity are nearly the same, wherever it has been adopted; since all systems are copied from the same original, namely, the English chancery system.

By the terms of our constitution, as we have seen, the judicial power "both as to matters of law and equity," is vested in the same courts, who are to have "common law and chancery jurisdiction, in all cases as shall be directed by law." This language establishes two points; *first*, that equity may or may not be a part of our judicial system, at the option of the legislature; but if adopted, it must be administered by the same tribunals which administer the law; and *secondly*, that our legislature is left entirely free, either to adopt the English chancery doctrines as they are, or to modify them at pleasure. To understand, then, the nature and extent of our equity jurisdiction, we must see what the legislature has actually done; and on referring to the statutes, we find two sets of provisions relating to equity jurisdiction. The first set of provisions merely apportions this jurisdiction between the supreme court and the court of common pleas, according to the value in dispute. In general, if this value be between one hundred and one thousand dollars, proceedings must be commenced originally in the common pleas, but may be carried by appeal to the supreme court; but if it exceed one thousand dollars, pro-

ceedings may be commenced indifferently in either court. In the single case of injunction, to stay proceedings at law, the common pleas may descend to twenty dollars, and the supreme court to one hundred; and in questions relating to land, either court may exercise original jurisdiction without regard to value. The other set of provisions is designed to fix the limits of chancery jurisdiction, with reference to the subject-matter. This jurisdiction is declared to extend to "all cases properly cognizable by a court of chancery, in which a plain, adequate, and complete remedy cannot be had at law;" and in exercising it, the courts are required "in all things to be governed by the known usages of courts of equity, except where it may be otherwise provided by law." The effect therefore of these provisions is, to adopt the English equity system as our own, except where the legislature otherwise directs; and it follows that in order to determine whether a given case is within our chancery jurisdiction, the two following points are to be considered. 1. Is there a plain, adequate, and complete remedy at law? For equity, as we have said before, is intended only to be subsidiary to law, to supply its deficiencies, and help out its designs. It is neither above law, nor opposed to it. Both are designed to promote the "great ends of justice, by the application of established rules. When the law is insufficient, equity steps in; but then only. If therefore the law furnishes no remedy, or only a doubtful or inadequate one, we have the first requisite for chancery jurisdiction. 2. Is there any authority, either in the statutes or precedents, for entertaining jurisdiction in the given case? For the question must be "properly cognizable by a court of chancery," and one, in deciding which the "known usages" of that court can be followed. Without this restriction, chancery powers would be, as they have been sometimes represented, perfectly arbitrary, and therefore unfit for freemen; but with it, they are sufficiently guarded. The proper rule is this; if a case be entirely new *in principle*, the court cannot decide it until the legislature gives authority; for this would be usurping legislative power. But when a case is only new in *the particular instance*, and can be brought within an established principle, by clear expression or analogy, then jurisdiction may be taken. Such then are the two predicates of chancery jurisdiction; namely, the absence of a sufficient legal remedy, and the existence of an authority to meet the case. To determine the first, we must know what remedies the law furnishes; and to determine the second, we must consult the statutes and reports. Thus you will observe that a knowledge of equity pre-supposes a knowledge of law; and this fact justifies the vesting of the two jurisdictions in the same persons.

The general sources of information to which you are referred are: 1. Our *statute* directing the mode of proceeding in chancery. 2. *Rules of court* made in pursuance of the statutory

provision. Without such provision, however, courts have the inherent power of making rules, for the convenience and despatch of business, not inconsistent with the existing law; which rules become the law of the court, and have the same authority as if made by the legislature. These rules are either *general* or *special*. General rules are those which apply to all cases coming within them; special rules are those adopted for particular cases. General rules are entered upon the journals of the court, and stand for law until rescinded. The general rules of the supreme court run through the state, and are binding upon the common pleas. Those of the common pleas extend only through the circuit in which they are made. Special rules are only obtained on motion of the party desiring them, and expire with the occasion. Our statutory provisions and rules taken together, modify materially those "known usages" of courts of chancery, which would otherwise govern our practice. 3. The "*known usages*" of courts of chancery, not affected by our statutes and rules. These are to be gathered from the books on equity before referred to, which are themselves framed upon the reported decisions.

§ 218. *Bill*. We are now prepared to consider the commencement and progress of a suit in chancery. Our statute declares that all applications to the chancery side of the courts shall be by *petition*, setting forth the nature and grounds of the complaint; which petition shall be filed in the clerk's office. This petition is commonly called a *bill*, and the filing of it is the first step in every chancery suit. I shall give a general description of its form and contents. In England bills are drawn with extreme formality and redundancy. The books divide a bill into *nine* distinct parts, so framed as to tell the story two or three times over; and each time, with all the expletives and tautologies which ingenuity can devise. The reason is, that such service is there paid for according to the number of words. Nor are we wholly exempt from the like abuse in this country: but the profession are beginning to improve in this respect, particularly in this state; and to content themselves with telling their story once in a plain and concise manner. In fact, the only important divisions of a bill are three; namely, the *address*, the *statement*, and the *prayer*. (a) 1. The *address* merely designates the court to

(a) *Form of a bill*. To explain more fully the nature of a bill, and show the difference between ancient and modern practice, I shall take the case of a bill to enforce the payment of a legacy, and give its form, first, as divided into nine parts, and then its form as it may be abridged.

1. *The address*. To the honorable the judges of the court of ———, sitting in chancery, within and for the county of ——— and state of ———.

2. *The introduction*. Humbly complaining sheweth unto your honors your orator, ——— of the county aforesaid.

3. *The premises*. That ——— of the county aforesaid, being seised and possessed

which the application is made. 2. The *statement* must contain a clear and explicit exhibition of the plaintiff's case. In setting

of a large real and personal estate, on or about the ———, did duly make and publish his last will and testament in writing, and thereby, amongst other things, did devise and bequeath to your orator the sum of \$———, by the words following, to wit, [here set forth the words], as by reference to said will, a copy of which is herewith exhibited as part of this bill, will more fully appear; and that the said testator departed this life on or about the ———; and that on or about the ———, one ———, named as executor in the said will, caused the same to be duly proved, and took upon himself the execution thereof, and took possession of the said real and personal property; and that since the same legacy became due and payable to your orator, he has frequently requested the said executor to pay the same, and had well hoped that he would have complied with such request, as in conscience and equity he ought to have done.

4. *The confederacy.* But now so it is, may it please your honors, that the said executor, combining and confederating with divers persons as yet unknown to your orator, but whom, when known, he prays to have made defendants with proper words to charge them with the premises, in order to oppress and injure your orator, does absolutely refuse to pay to your orator the said legacy or any part thereof; and for reason of such refusal, the said confederates sometimes pretend that the said testator made no such will, and at other times, that his real and personal estate was not sufficient to pay his debts; and at the same time, the said confederates refuse to discover and set forth what such real and personal estate really was, or its value, or how the same has been disposed of.

5. *The charging part.* Whereas your orator charges the truth to be, that the said real and personal estate was of the value of \$———, as he is informed and believes; and that it was more than sufficient to pay all the debts of the said testator, and the legacies mentioned in the said will; and that the said confederates, or one of them, have converted the same to their own use, without satisfying your orator for his said legacy; all which pretences and doings are contrary to equity and good conscience, and tend to the manifest injury of your orator.

6. *The jurisdiction part.* In tender consideration whereof, and for that your orator is remediless in the premises by the strict rules of the common law, and relievable only in a court of equity, where matters of this sort are properly cognizable.

7. *The interrogatory part.* To the end therefore, that the said confederates may respectively full, true, direct, and perfect answers make, upon their respective corporal oaths, according to the best of their knowledge, information, or belief, to all and singular the matters aforesaid, as fully, in every respect, as if the same were here again repeated; and more especially that they discover and set forth whether the said testator did duly make and execute such a last will and testament as before stated; and did thereby bequeath to your orator such legacy as aforesaid: and that they produce the said will with the probate thereof; and that they state when the said testator died, and who caused the said will to be proved, and undertook the execution thereof; and whether the said legacy has not become due and payable to your orator; and whether he has not requested payment of the same and been refused upon the pretences aforesaid; and that they may discover and set forth the real and personal property belonging to the testator, and its value, and whether the same was not sufficient to pay all the debts and legacies aforesaid, and what has become of the same.

8. *The prayer for relief.* And that the said confederates may be compelled by a decree of this honorable court to pay to your orator his said legacy of \$———, with interest thereon since the same was due, and that your orator may have such other and further relief in the premises as the nature of the case shall require, and as to your honors shall seem meet.

9. *The prayer for process.* May it please your honors to grant unto your orator the most gracious writ of subpoena, to be directed to the said ——— executor as aforesaid, and the rest of the confederates when discovered, commanding them, on a certain day, and under a certain penalty, therein specified, personally to appear before your honors, and then and there to answer all and singular the premises aforesaid, and

it forth, aim first of all at precision, avoiding equally redundancy and ambiguity; and bear this constantly in mind, that the sole object of the bill is to make known the facts material to your claim. The evidence of those facts, and the conclusions of law arising from them, would be out of place. The court wish only to be informed what the facts are; and common sense is the best guide in narrating them. In averring *numbers*, it is safer to use words than figures, but this is not indispensable. *Abbreviations* had better be avoided, because they may not be rightly understood. If your case be connected with *written instruments*, the better practice is to state in the bill only so much of their *substance* as is necessary to make the case intelligible; and to annex *copies* thereof by way of *exhibits*. I say *copies*, because prudence dictates the retention of the *originals*, until the final determination of the cause, when they must of course be produced. You are at liberty indeed to copy them out in full, in the body of the bill; but it will be seen at once that your case cannot then be so quickly understood, as from a judicious abstract. 3. The *prayer* forms the concluding part of the bill; for in obedience to ancient usage, as before explained, you approach the court in the language, not of *demand*, but of *supplication*. The prayer usually includes the four following matters; namely, 1. That all persons supposed to be interested may be made *defendants*, and that a *subpœna* may issue accordingly. It is convenient, though not essential, to name all the defendants together in this clause, though they may have been mentioned before, in order that a

abide such order and decree as your honors shall make; and your orator, as in duty bound, will ever pray, &c.

The above bill would be equally effectual in the *abridged form* which follows:—To the court of ———, sitting in chancery, within and for the county of ———, and state of ———. Your petitioner ———, of the county aforesaid, respectfully shows, that on or about the ———, one ——— of the county aforesaid, owning a large amount of real and personal property, duly executed his last will and testament, a copy of which is exhibited as part of this bill, and thereby bequeathed to your petitioner a legacy of \$———, in the words following, to wit, [here set forth the words]; that the said testator died on or about the ———, and shortly after, on or about the ———, one ——— named in said will as executor, caused the same to be duly proved, and undertook the execution thereof; that the property and effects belonging to the said testator, and taken possession of by the said executor, were more than sufficient to pay all the debts of the said testator and the legacies mentioned in the said will; but the exact description and amount of which, your petitioner is unable to state; that since the said legacy has become due and payable to your petitioner, he has often requested the said executor to pay the same, but the said executor has neglected so to do. Being, therefore, without remedy at law, your petitioner prays for relief in chancery; and that a subpoena may issue to the said ———, executor as aforesaid, who is made defendant to this bill; and that the said defendant may answer under oath to all the matters herein alleged; and especially may discover and set forth a copy of the said will and probate, and the nature and value of the property and effects of the testator which came into his hands, and what has become of the same; and that upon a final hearing this court may decree that the said executor pay to your petitioner the legacy of \$———, so bequeathed to him; and that your petitioner may have such other and further relief as shall seem equitable.

single glance may ascertain them; and if their names be not known, their relation to the suit should be stated. 2. That the defendants may answer *under oath* to all the allegations of the bill. This would probably be required without any prayer, being a positive rule of law; but it is customary to insert it. And this is also the place for specific interrogatories, if you think proper to propound them: but as these can only be founded upon the allegations before made, they are seldom of much use, and never indispensable. 3. That the court may grant the *specific relief*, to which you conceive the plaintiff to be entitled, setting it forth particularly. 4. That such other relief may be granted, as the court shall deem equitable. This is called the prayer for *general relief*, and should never be omitted; because the plaintiff may be entitled to some relief, when he cannot have the specific relief prayed for. The bill is now signed by counsel. This is the English rule, and the intention is to have security against scandalous or impertinent matter, by holding the solicitor responsible. In common cases the bill is now ready to be filed. But there are two exceptions; namely, *bills of ne exeat*, to prevent persons from departing out of the jurisdiction; and *bills of injunction*, to stay legal or other proceedings. These further require, as will be explained hereafter, an *affidavit* by the plaintiff of their truth; an *allowance* by the court in term time or a single judge in vacation; and *security* to the other party, in such sum as the court or judge shall determine. The bill is now *filed*, that is, deposited with the clerk, who notes the date of filing on the back, and enters the cause on the appearance docket.

§ 219. *Subpœna.* (a) The next step is for the clerk to issue the *subpœna*. This is a writ commanding the sheriff, who is the executive officer of this court, as well as of the courts of law, to summon the defendant to appear and answer, under the penalty of a thousand dollars. The form is prescribed by the statute. If the bill be filed in term time, the *subpœna* is made returnable forthwith; otherwise to the next term; and in either case the term at which the writ is to be returned, is called the *appearance term*. We have seen that this writ is usually prayed for in the bill. The statute, however, seems to require a separate application, after filing the bill; and this is usually made in the form of a *precipe* on the back of the bill. The *subpœna* takes its name from the penalty it threatens in case of disobedience. It was devised, as we have seen, when the foundations of chancery power were not very firmly established; and the threat of a

(a) *Form of a subpœna.* [Omitting the caption and conclusion, which are the same as in all other writs.] We command you to summon ——— to appear before our court of ———, on the ———, to answer a petition in chancery exhibited against him by ———; and this he shall in no wise omit, under the penalty of one thousand dollars: and have you then and there this writ with your doings thereon.

penalty no doubt then had its effect. But it is probable that this penalty could not now be specifically enforced in any way; nor is this necessary in order that the writ may be effectual. For the court has express power, as we have seen, to enforce obedience to all its process, rules, and orders, by *attachment for contempt*; in which proceeding the delinquent may be fined, or imprisoned until he complies, or his property may be sequestered in certain cases. This, of course, includes disobedience to a subpœna, and supersedes the necessity of a penalty in the writ. Besides, if the defendant disobeys, he is in general sufficiently punished, as we shall see hereafter, by the consequences of default. The subpœna is delivered to the sheriff to be *served*. If the defendants reside in different counties, within the state, subpœnas may be directed accordingly. *Service* is made any where within the state, by delivering a copy of the subpœna to the defendant, which is called *personal service*; or by leaving it at his usual place of abode, which is called *service by copy*. The *return* is made by endorsing the time and manner of service upon the original, and returning it to the clerk's office. But if any or all of the defendants reside out of the state, the manner of giving notice is in one of two ways; namely:—1. By personal service of the subpœna, together with a copy of the bill; in which case, the return being made by a person not known to the court, must be verified by affidavit. 2. By a newspaper advertisement published for six consecutive weeks, setting forth the pendency of the suit, with a brief description of the object and prayer of the bill. If there be no newspaper printed in the county, it must be one printed in the state, and which has a general circulation in the county. This is at best a very uncertain mode of notifying non-residents; and, therefore, to prevent hardship, it is provided, that where a decree has been rendered against the defendant under such circumstances, he may, at any time within five years, have the proceedings opened, by giving notice to the plaintiff, making affidavit that actual notice was not received in season to make defence, and paying costs. But if land has been sold in the mean time, under such decree, the purchaser is not to be disturbed. The general principle is, that suit must be commenced in that county where one or more of the defendants reside. But if it relate to *land*, it must be in that county where the land lies; or if it lies in several counties, then in either. In proceedings against *heirs*, whose names or residence are unknown, upon affidavit of that fact, the court will allow the suit to go on, and make such order relating to notice, as they may deem proper. If any of the defendants be *infants*, as proceedings here are never staid on that account, the plaintiff must apply to the court to appoint a *guardian ad litem* to conduct the defence, who must be notified of the fact, and accept the appointment, before the decree will be conclusive against such

infants; for although infants may sue by their *next friend*, they can only defend by a *guardian ad litem*.

§ 220. *Appearance and defence.* Upon the return of the subpoena served, or upon due proof of notice, as the case may be, the defendant is considered as *in court*, and may be proceeded against accordingly. This is a great departure from the English practice, which requires an *actual appearance* before any final proceedings can be had; but furnishes all possible facilities for enforcing such appearance. Our rule, however, which substitutes a virtual for an actual appearance, is far more beneficial to the plaintiff; since if he take the requisite steps before mentioned, it is not in the power of the defendant to prevent a decree. When there is an actual appearance, it is usually signified by the counsel for the defendant, usually called *solicitor*, who writes his name in the margin of the appearance docket, opposite to that of his client. He is then entitled to a *copy* of the bill, which is charged among the general costs of the suit. This rule extends to all adversary proceedings, but provides for only one copy, however many opponents there may be. The defendant then has *sixty days*, by our statute, after the end of the appearance term, before he can be placed in default. Within this period, he must either *disclaim* or *make defence*, or suffer the consequences of his *default*; and I shall describe the proceedings under each of these aspects.

Our statute justly provides that where a defendant will come in and disclaim all interest in the matter in dispute, the plaintiff shall pay the costs, unless the court otherwise order. In general such disclaimer need not be under oath; for when a man denies having any interest in that which has value, his word will be taken as sufficient. When, however, the object of the bill is to compel a *discovery of facts*, which the defendant may be interested in concealing, his disclaimer of knowledge or interest must be under oath, and takes the form of an *answer*. A disclaimer is signed by the defendant or his counsel; and on being filed, the bill will be dismissed as to that defendant, at the cost of the plaintiff. In fact, the chief or only motive for putting in a simple disclaimer is to avoid the payment of costs. (a) But we will now suppose that the defendant, instead of disclaiming, has an interest in the matter of the bill, and wishes to make *defence*. This can only be done in one of three ways; namely, by *demurrer*, *plea*, or *answer*. If the bill, admitting its truth, be insufficient upon its face to entitle the plaintiff to recover, the defendant presents that question to the court by *demurrer*; but if the bill be sufficient upon its face, the defendant must either set

(a) *Form of a disclaimer.* The disclaimer of ——— to the bill filed against him by ———. The said ——— comes and disclaims all manner of interest or concern in the matters alleged in the said bill, and prays to be hence dismissed with his costs.

up some new matter of defence to obviate its effect, or deny the allegations therein made, or both. If the new matter of defence consist of a single fact or a single result from several connected facts, it may be presented in the form of a *plea*; but if this be not the case, the defence can only be presented in the form of an *answer*. Whichever course be adopted, the time allowed is sixty days after the end of the appearance term. Would not a shorter time better promote the ends of justice, and redeem the constitutional pledge against delay?

§ 221. *Demurrer.* (a) The object of a demurrer in chancery, after the analogy of a demurrer at law, is merely to present to the court the question of the *sufficiency* of the bill; and it occurs at no other stage of the proceedings. It impliedly admits the facts alleged, but denies the equity claimed. It is signed by counsel; but requires no affidavit, because it alleges no fact. A *special* demurrer differs from a *general* demurrer only in specifying wherein the insufficiency consists. It would seem from the language of the books that a special demurrer may be put in, as at law, for a mere matter of form; but this is in direct opposition to the whole spirit of equity, and is not known in our practice. We demur only for a defect in substance; and though it is always the more liberal course to specify the cause of demurrer for the information of the other party, yet this is regarded as a matter of option, and not of compulsion. The demurrer may be to the entire bill, or to some particular part; and in the latter case, the part demurred to must be specified, and a plea or answer put in to the rest. But you cannot demur, and at the same time plead or answer to the same part of the bill; for the plea or answer would supersede such demurrer; and when you demur, and plead or answer to different parts, the demurrer must

(a) *Form of a demurrer.* The demurrer of ——— to the bill filed against him by ———. The said ———, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill set forth to be true, in manner and form as the same are therein alleged, says he is advised that there is no matter or thing in the said bill contained sufficient in law to call this defendant to answer in this court; and therefore this defendant demurs to the said bill, and for cause of demurrer says, that the said bill contains not any matter or thing entitling the complainant to any relief against this defendant; wherefore, and for divers other errors and imperfections in the said bill appearing, this defendant demurs thereunto, and humbly prays judgment of this honorable court, whether he shall be compelled to put in any further answer to the said bill, and that he may be hence dismissed with his reasonable costs, in this behalf most wrongfully sustained.

But this form may be *abridged* as follows. After the caption, as before, say:—The said ——— comes and demurs to the said bill, and says that the complainant has not presented such a case as entitles him to relief in equity; wherefore he prays judgment, whether he shall be compelled to make any further answer thereto, and that he may be hence dismissed with his costs.

In case of a *special demurrer*, add the causes thereof immediately before the prayer for judgment. The *joinder* in demurrer merely contradicts the demurrer, by asserting that the bill does present such a case as entitles the complainant to relief in equity.

be first disposed of; the manner of doing which, I will now describe. Upon filing the demurrer, the cause is at issue without a formal *joinder*, though this is sometimes added. Either party may now "*set the cause for hearing*." This is done by an entry on the office docket thus; "This cause is set for hearing on demurrer;" which entry is dated and subscribed by the solicitor. The effect of setting a cause for hearing is to bring it upon the issue docket. By our rules it may be done either in term or vacation; but the hearing can only take place in term; and at least twelve days must elapse after setting the cause for hearing, before it can be called up for hearing, unless by general consent. The language of our rule is that causes shall be entered on the issue docket, in the order in which they have been set for hearing; but this, though it seems but reasonable, conflicts with the statutory provision, which requires the order to be the same as on the appearance docket. It now becomes the duty of the counsel demurring to prepare a *brief*, containing an abstract of the case, with the points and authorities relied on; which brief must be presented to the court on the first day of the term, if the cause was set for hearing before that day; otherwise, on the day of setting it for hearing. A neglect to do this may occasion the demurrer to be overruled at the costs of the demurrant; though this penalty is seldom enforced. When the cause comes up for hearing, which must be in its regular order, unless the court assign a particular day, the counsel who furnishes the brief, has the opening and close of the argument. The court then pronounces the decree; the nature of which will be considered hereafter. At present I will merely point out its consequences in the case before us. If the demurrer be allowed, it is a decision against the bill, and the plaintiff must pay the costs; but he may obtain leave to *amend* his bill, if it admits of amendment, and thus put the defendant to his plea or answer. On the subject of *amendments*, the court has unlimited discretion; but when a party obtains leave to amend after hearing, he is required to submit to such terms in regard to *costs*, and to the time and manner of coming to another hearing, as the court deem equitable. Indeed as to *costs* in chancery, it may be remarked generally that our statute places them entirely at the discretion of the court of chancery, both as to the amount, and the party who shall pay them; except in some few cases where special provision is made; and payment may be enforced by any method the court may direct. But if, on the other hand, the demurrer be overruled, the defendant must pay the costs; and no other demurrer will be received. But the defendant may obtain leave to plead or answer, upon making affidavit that he has a meritorious defence, and that the demurrer was not filed for the purpose of delay. Otherwise a decree will be rendered upon the bill as confessed.

§ 222. *Plea.* (a) The second method of making defence is by *plea*. This is the proper course where the defence rests upon a *single point*, as, for example, the statute of frauds, a release, or the like; or upon several matters so connected as to result in a single point; but two or more distinct matters of defence are not allowed in the same plea or in different pleas. They can only be presented in an answer. A plea may be either to the whole bill, or to some particular part. In the latter case, the particular part must be specified, and a demurrer or answer put in to the rest. It must be signed by counsel; and as it alleges some fact, it must be verified by affidavit, unless it be founded upon a question of jurisdiction or some matter of record. After stating with precision the matter of defence, and making such denials as the case requires, it concludes with a prayer to be thence dismissed with costs. When the plea has been filed, the plaintiff may contest either its *sufficiency* or its *truth*; and he has *thirty days* after the time of filing the plea, within which to make up his mind. If he resolves to contest its *sufficiency*, no demurrer is necessary to present that question, but the cause is simply set for hearing *upon bill and plea*. This may be done by either party, after the thirty days; and the question thus raised being purely a question of law, the course of proceeding, as to brief and argument, is throughout the same as upon demurrer, and need not be here repeated. The consequences too are similar. If the plea be held sufficient, the plaintiff will still be permitted to contest its truth, upon such terms as the court may prescribe; and if it be held insufficient, the defendant may obtain leave to answer, upon the same terms as when a demurrer has been overruled. But if the plaintiff resolve to contest the *truth* of the plea, he must prepare the way by filing a *replication*, which I will next describe.

§ 223. *Replication.* (b) This is the formal method of tendering

(a) *Form of a plea.* The plea of ——— to the bill filed against him by ———. The said ———, by protestation, not confessing or acknowledging all or any of the matters contained in the complainant's bill to be true, in manner and form as the same are therein declared, for plea thereunto says, that before the filing of this present bill, to wit, on or about the ———, the said complainant filed his bill in this court against this defendant, for the same matters and to the same effect, and for the like relief and purpose, as the present bill; to which said first bill this defendant has made answer; and the said first bill is still depending in this court, and the said cause undetermined; wherefore this defendant does plead the said former bill and proceedings in bar of the present suit; and prays judgment whether he shall be compelled to make any further answer thereunto; and that he may be hence dismissed with his costs.

This form might be *abridged* by leaving out the protestation, and commencing thus: The said ——— comes and pleads to the said bill and says, &c. As this plea relies on a matter of record, it requires no affidavit; but when an affidavit is required, its form is the same as that appended to an answer, and will be given hereafter.

(b) *Form of a replication.* The replication of ——— to the plea [or answer] of ———. This repliant saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea [or answer] of the said defendant, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true,

an issue in fact either to a plea or answer. It is the last stage of chancery pleadings, and opens the door for testimony on both sides. It must be filed, as we have seen, within thirty days. It requires no oath, but is signed by counsel and filed. Our rules then allow *twenty days for the taking of testimony*, which will be considered hereafter. Each party may, after that time, set the cause for hearing on bill, plea, replication and testimony; after which further testimony cannot be taken without special leave; and the subsequent proceedings, as to brief and argument, are the same as before described on demurrer. If the defendant succeed in proving his plea, this is conclusive; for its sufficiency has been admitted by filing the replication. The bill must therefore be dismissed at the plaintiff's costs. But if the defendant fail in his proof, the situation of the case is analogous to that of a demurrer overruled; and the court will permit an answer to be filed, upon the terms before stated. This brings us to the consideration of the answer.

§ 224. *Answer.*(a) The third and last method of making de-

certain, and sufficient in law, and that the answer is very uncertain, evasive, and insufficient in law to be replied unto by the repliant, without that, that any other matter or thing in the said plea [or answer] contained, material or effectual in law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

It may be doubted whether the history of judicial proceedings furnishes any thing more inexcusably involved in unmeaning verbiage than this. The following form, is entirely sufficient. After the caption say:—The said complainant comes and replies to the said plea [or answer], and says that the matters and things alleged therein are not true; and this he is ready to verify.

(a) *Form of an answer.* The answer of ——— to the bill filed against him by ———. This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the bill of said complainant, for answer to the same or to so much thereof as this defendant is advised is material to be answered, he answers and says, he admits that ——— did duly make and execute such last will and testament in writing, of such date, purport and effect as is set forth in said bill, and did thereby bequeath to said complainant a legacy of \$——— by the words of bequest therein stated; and that this defendant, as executor named in said will, did cause the same to be proved, and took upon himself the execution thereof, and took possession of the real and personal property of the testator, as charged in said bill; and this defendant is ready to produce a certified copy of the said will and probate, as this court shall direct; and this defendant admits that said complainant has repeatedly called upon him for the payment of the said legacy, and that no part of the same has yet been paid. But this defendant denies that the reason for not paying the said legacy is correctly stated in the bill. On the contrary, he avers the truth to be, that the debts due by the said testator amounted to the sum of \$——— as nearly as can now be ascertained, a list of which is given in schedule A, annexed to this answer, and made part of it; and that the effects of the said testator, which have come to the hands of this defendant, consist of the choses in action, moneys and chattels returned in the inventory made by this defendant pursuant to the statute, a copy of which inventory with the appraisement is hereto annexed as exhibit B, and made part of this answer, amounting nominally to \$———; and certain real estate described in exhibit C, which is made part of this answer, supposed to be worth \$———; and this defendant says, that although he has labored with

fence is by *answer*. The answer must respond to all the material allegations in the bill, and may contain any new matter essential to the defence. The plaintiff has a right to claim a specific admission or denial of every fact he alleges, whether there be specific interrogatories or not; and this without ambiguity or evasion. If the defendant has positive knowledge, he must so answer. If not, he must state his information or belief, or deny having any information or belief; and having thus satisfied the claims of the plaintiff, the answer may go on to make all such statements, by way of explanation or addition, as may be necessary in order to present the whole defence. Thus the answer may include any matter which might have been presented by way of plea; and as its whole effect is to deny the plaintiff's equity, it includes also a demurrer. A defendant, therefore, should never demur or plead, unless he is quite sure there is good cause; for by answering, he may obtain the whole benefit of both, together with much more. Indeed the additional expense and trouble of an answer, furnish the only reason for not making it the sole method of defence. In drawing an answer, admit or deny what the bill alleges, and state your own defence, with the same precision, as if you were drawing a bill; and conclude with a prayer that the defendant's interests may be protected, and that he may be thence dismissed with costs. The answer is signed by counsel, and verified by the affidavit of the defendant; which affidavit may be made before the clerk in open court, or before any judge, justice of the peace, or master in chancery. The only case where an oath is not required, is that of a corporation which answers under its corporate

all diligence to convert the said assets into money, and settle the estate of the said testator, by paying first the debts, and then the legacies; yet up to the present moment it has been and still is doubtful whether there will remain sufficient, after paying the debts, to pay the legacies, as will appear by a statement of the present condition of the estate contained in exhibit D, which is made a part of this answer; and this is the true reason why the legacy of the said complainant has not yet been paid. This defendant denies all unlawful combination and confederacy with which he is charged, without that, that any other matter or thing material to be answered, and not herein sufficiently answered, confessed or avoided, traversed or denied, is true, to the best of his knowledge or belief. All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed with his reasonable costs, in this behalf most wrongfully sustained.

Affidavit. The said defendant makes oath and says that the matters and things contained in the above answer, so far as stated from his own knowledge, are true; and so far as stated from information, he believes them to be true. [Signature of defendant]. Sworn to and subscribed before me, a ——— this ———. [Signature of the officer].

The merely formal parts of the above answer may be omitted without the slightest detriment. They are first, the reservation in the beginning, instead of which, say:— This defendant, for answer to the said bill, says, &c.; and secondly, the denial of combination and all which follows it, except the prayer to be dismissed with costs, which is a proper though not a necessary close of the bill. Sometimes, indeed, unlawful combination to defraud is the real matter of the bill, and then its denial is material in the answer; but the clause which follows the awkward phrase, "without that, that," can never be material.

seal; and even here an affidavit may be had by making one of the officers a party. If there be several defendants whose defence is the same, they ought to answer jointly to save expense; but this is not imperative. When the answer has been filed, the plaintiff may proceed as in case of a plea; that is, either to contest its *truth* or its *sufficiency*; and he has *thirty days* within which to make up his mind. If within this time he takes no step on the subject, either party may set the cause for hearing *on bill and answer*; in which case the answer will be taken as true in every part; and no evidence will be allowed to contradict it, unless it be matter of record referred to in the answer. The court however, may, upon good cause and equitable terms, allow the plaintiff still to contest the truth of the answer. This is done, as in the case of plea, by filing a *replication*. The proceedings are then throughout the same, in every particular, as when a replication is put in to a plea; and therefore need not be here repeated. Our statute provides, that if the defendant wishes to bring *new parties* before the court, he may state this in his answer, and insert *interrogatories* for them to answer; and thereupon a subpoena will issue as in case of a bill. It is further provided that after the answer has been filed, the defendant may file interrogatories to be answered by the plaintiff; and if he neglect to answer them, his bill will be dismissed at his costs. Thus each party is enabled to avail himself to the fullest extent of the other's testimony under oath. There is still another provision of like nature, founded on the English practice, which is, that the defendant may file a *cross bill*, to which the original plaintiff and any other persons may be made defendants; but the first bill must be answered, before an answer to the cross bill can be enforced. But it would seem as if the other provisions, allowing the defendant to make new parties by his answer, and compel them to answer interrogatories, and also allowing him to put interrogatories for the plaintiff himself to answer, entirely supersede the necessity of a cross bill in any case. The object of a cross bill is, either to bring new parties before the court, when that is essential to the defence; or to set up against the plaintiff some matter of defence, which by the rules of pleading could not be set up in the answer. It is always considered as a defence, and is so connected with the other bill, that they are always considered as but one cause. It can, therefore, effect no purpose, which would not be effected with greater facility and simplicity, by pursuing the course pointed out in the foregoing provisions, which may be regarded as a decided improvement; still a cross bill may be resorted to, because the statute authorizes it.

We have seen, that if the defendant undertakes to answer, the plaintiff is entitled to a full and explicit response, by admission or denial, to every material allegation in the bill, without subterfuge or evasion. If, therefore, the answer falls short in this

respect, the plaintiff may refer the question to the court by means of *exceptions*. (a) The exceptions are signed by counsel, but of course require no affidavit. Upon filing them, it is at the option of the defendant, either to supply the deficiency voluntarily by answering further; or to set the cause for hearing on the exceptions, and thus submit the question of the sufficiency of the answer to the court. In the latter case, the exceptions are argued and decided upon as any other question. If they be overruled, the plaintiff must pay the costs; and he may then obtain leave to file a replication; but if they be sustained, the defendant pays the costs, and must put in a further answer within *thirty days*, or such other time as the court shall fix; otherwise, the bill will be taken as confessed. Exceptions may again be filed to this second answer, if it be deemed still insufficient, on which the same course may be taken. And if the answer be held still insufficient, the defendant pays double costs, and cannot put in a further answer; but the bill is taken as confessed. Or, if it be material to the plaintiff, as on a bill of discovery for example, he may have the defendant examined upon interrogatories, and committed until he answers them sufficiently. In like manner, where the defendant under the statutory provision, has put interrogatories to the plaintiff, or to a new defendant, he may take exceptions if the answer be insufficient. Thus each party has the power of extorting the whole truth from the other, or driving him to imprisonment or perjury.

The only remaining aspect of proceedings is that of *default*. If the defendant does not disclaim, or make defence by demurrer, plea, or answer, within the time limited, he is said to be in default, and the bill is taken as *confessed*. But to provide as far as possible against injustice, when only one party is before the court, the statute and rules provide that even here, proof may be required of the facts alleged in the bill, if the court think proper; and also, that the time of defence may be extended, if good reason be offered. In case of default, the practice is this:—the plaintiff either in term or vacation, files a *decree nisi*, as it is called, that is, a draught of such a decree as he wishes, and makes a memorandum of the fact, with the date upon the office docket. Then, after the lapse of the time fixed by the rules, on any day in term, he moves to have the decree nisi *confirmed*. This is done of course, unless the defendant has previously entered on the docket notice of his intention to resist such confirmation, and at the time shows sufficient reason to the court for granting leave to make defence;

(a) *Form of exceptions.* The exceptions of ——— to the answer of ———. The said ——— comes and excepts to the answer of the said ———, and for cause of exception says,—1. That &c. [Note all the exceptions in this way and then say]; in all which particulars the said ——— insists that the said answer is evasive, imperfect, and insufficient; wherefore he prays that the said ——— may be compelled to answer further.

in which case he must submit to such special terms, as the court may prescribe. The plaintiff then has his option, to set the cause for hearing at that term, or have it continued.

§ 225. *Hearing.* I have thus traced a chancery cause up to the time of hearing, in each of the ways in which it can be presented; namely, on disclaimer, demurrer, plea, answer, and bill confessed. And I think it must have occurred to you, even from this brief sketch, that chancery proceedings are vastly more simple, natural, and rational, than the corresponding legal proceedings by which parties are brought to issue. It would now be in order to speak of the decree which is consequent upon the hearing; but I shall first allude to some prior incidental matters, which could not be mentioned before, without breaking in upon the regular narrative of the proceedings.

1. *Testimony.* The first of these is the taking of *testimony*. It is not intended here to discuss the principles of evidence. The rules which regulate the competency and credibility of witnesses, are, in general, the same in chancery as at law; except, that in chancery, the *parties* are made witnesses. But in the mode of presenting testimony, there is this great difference, that in chancery *oral testimony* is universally excluded. Witnesses are never examined *at the hearing*; the testimony is taken beforehand, and reduced to writing in the form of a *deposition*. If there be a single exception, it is where it becomes necessary at the hearing to identify an exhibit. Depositions, therefore, constitute the only form of presenting personal testimony in chancery. But depositions have been sufficiently discussed in the preceding lecture; there being no difference between those taken in legal and in chancery proceedings.

2. *Issue sent to a jury.* (a) We have already seen that as a general rule, the court of chancery decide upon the *facts* as well as the law: but as a jury is considered the best tribunal to weigh evidence and decide questions of fact, courts of chancery have always had the power of directing an issue to be tried by a jury, whenever they should deem it expedient. Our statute expressly confers this power, and declares that the verdict shall be entered of record, and made use of at the hearing. But it makes no provision as to the manner in which the issue shall be made up. In England, when the question admits of it, the chancellor directs an action to be brought in a court of law; otherwise, an issue is made up by the master, an officer to be described hereafter; and then a *feigned declaration* is drawn alleging a *wager* between the plaintiff and defendant on the result of that issue; but this introduction of a wager seems to be as utterly puerile, as it is clearly unnecessary. Indeed an action could not be sustained upon a wager in this state; but our court has regulated the practice in

(a) See *Greene v. Greene*, 5 Ohio, 278; 1 Newland, 350.

these cases, in such a manner as to dispense with a wager. According to the precedent reported, when the court order an issue to a jury, they direct the form of the issue, and which party shall have the affirmative. This party then files a declaration simply asserting the affirmative, and the other party files a plea simply denying it. The issue is then tried by a jury in the usual form, and the testimony on file in the cause may be read on such trial, unless the court otherwise order. The verdict is conclusive, unless the court see reason to grant a new trial. In England it is not uncommon for issues in law to be in like manner referred to the courts of law; but this practice is unnecessary here, because the same judges officiate in both courts. I have before suggested that the forms of chancery procedure might be readily adapted to all cases in law as well as equity; and does not this expedient of making up an issue for a jury whenever such recourse is necessary, and so shaping such issue as exactly to meet the exigency, take away the only plausible objection that could be raised, against so immense an improvement, namely, the want of trial by jury?

3. *Master.* (a) Our statute empowers each of the courts to appoint such number of persons as they think proper, in each county, to act as *master commissioners* in chancery, for three years, unless removed for good cause. These officers, who are usually called simply *masters*, have power to take depositions both in law and chancery, and to do all other acts of a ministerial nature, commonly performed by masters in chancery. Their fees are the same as are allowed to other officers for like services, and when not ascertained by law, are fixed by the court. They cannot administer oaths generally, but only to answers in chancery and depositions. The statutory provisions go no further; and for the rest of their duties, we must refer to the usages of chancery. In general, masters act as aids to the chancellor, in stating accounts, estimating damages, taking testimony when more is required, making up issues, examining answers when excepted to, investigating titles to real estate, making sale thereof under decrees, and the like. When the services of a master are required, the court make an *order of reference* to him, with such instructions as the case requires. Having performed the duty, he makes *report* of his proceedings. To this report either party may file *exceptions*. The cause is then set for hearing on these exceptions, and the proceedings are similar to those upon exceptions to answers. If it be found necessary, the cause may be referred back again for further report: but when the report is not excepted to, it is conclusive of the matter in question. It will be readily seen how much this expedient of referring matters to a master, diminishes the labors of the court, and facilitates chan-

(a) See 1 Newland, 6.

cery investigations. Courts of law experience great inconvenience from the want of such an officer. Their most complicated matters must be examined by the jury, and determined upon before separation. Twelve minds, unprepared by education or habit, are there required to make the most intricate investigations in the result of which all must concur, under every disadvantage as to time, place, and convenience. Whereas a master in chancery can perform the same duty, under all the advantages of skill, experience, leisure, and singleness of purpose. Here then we have another signal instance of the superiority of chancery proceedings.

4. *Receiver.* Our statute contains nothing on the subject of *receivers in chancery*; but according to the established *usages* of this court, they are appointed whenever occasion requires: and this happens, whenever there is a controversy touching property, which requires some person to take care of it in the mean time, and the parties cannot agree upon that person. In such cases, to prevent waste or deterioration, or perhaps to complete improvements in progress, the court appoint a *receiver*, to take possession of such property, as their officer; and it is thenceforth considered as in custody of the court. The duties of the receiver are specified in the *order* of appointment, and he is required to give bonds for fidelity in such sum as the court shall determine. It will be readily admitted that this power of taking disputed property out of the control of those who claim to own it, is to be exercised with great caution, and only when a strong case is presented, by the party applying: but then, the power is found to be a most salutary and beneficial one. For want of something analogous in the courts of law, litigants often suffer great loss and inconvenience; and thus the employment of a receiver, when the case requires it, may be cited as another peculiar advantage of chancery proceedings.

5. *Supplemental bill.* The object of a supplemental bill is generally to bring before the court, any matter material to the plaintiff's interest, which has happened after filing the original bill, and before the rendition of the decree. It states the original bill and proceedings thereon, and the event which makes a supplemental bill necessary. A subpoena issues, as on filing an original bill; but this bill is not confined exclusively to matter which occurred before the decree. It may be founded on matter occurring after the decree; but it is then usually connected with a *bill of review*, or *bill of revivor*, which will be described hereafter; and takes the name of one of these. A supplemental answer may be filed in like manner, on leave of the court, which is usually granted as a matter of course. In fact, the grand principle which runs through all chancery proceedings, is to give to each party, at all times, every possible facility, for bringing the full merits of his case before the court.

§ 226. *Decree.*(a) We have now reached that stage in the proceedings, when the court pronounce their decision. This decision is called a *decree*, and corresponds to the judgment in proceedings at law. Decrees are either *interlocutory* or *final*. A decree is *interlocutory*, when some material circumstance is wanting to enable the court to determine finally between the parties; and for that reason some reference is made of the case. Thus, when a cause is referred to a master, or a receiver is appointed, or an issue is directed to a jury, the order made by the court is an interlocutory decree. A decree is *final*, when all the circumstances necessary to a complete explanation of the matters in litigation, are brought before the court, and on full consideration, decided upon. In order to determine whether a decree is interlocutory or final, we must look, not to the *stage of the cause*, at which it is rendered, but to what the decree itself contains. For a decree may be final as to the subject-matter of it, when it does not put an end to the cause. Thus on a bill of foreclosure, a decree of *sale* of the mortgaged premises is final as to that matter, though a further order remains to be made upon the report of the sale. In practice, the court do not themselves usually frame the decree; but merely indicate its contents in the opinion they deliver. The counsel in whose favor it is rendered, then draws up the decree pursuant to the intimations of the court, and submits it to the opposite counsel for approval. If he make no objection, it is *entered in the journal* as a matter of course. If he object, it is submitted to the court, who so correct it, as to make it conform to their decision; and it is then entered upon the journal. We have seen that upon a bill confessed, a *decree nisi* must be drawn up and filed beforehand; and would it not be a good practice generally to prepare in advance, such a decree as you expect to obtain, and show it to your opponent, that it may be submitted to the court for approval, immediately upon delivery of their opinion,

(a) *Form of a decree.* When the decree is for the complainant, it must of course adapt itself to the exact relief to which he is found to be entitled, and therefore the form must vary to suit each case. In all cases, however, the following order may be observed. After stating the names of the parties, say—This cause came on for hearing, upon the bill, answer, &c., [stating the condition of the pleadings]; and was argued by counsel; and the court find that, &c., [stating the facts upon which the decree is founded]; and thereupon it is ordered and decreed that, &c., [stating whatever each party is to do, and concluding with the payment of costs].

But when the decree is for the defendant, it is always in the same form, unless with respect to the payment of costs, which though generally decreed against the complainant, may, for some special reason, be otherwise disposed of. The form is as follows:—This cause came on for hearing upon the bill, answer, &c., and was argued by counsel; and the court find the equity of the case to be with the defendant; and thereupon it is ordered and decreed that the complainant's bill be dismissed; and that he pay the costs of this suit within ——— days; and that in default thereof, execution issue therefor, as on judgments at law.

If the bill be dismissed generally, this will be a final bar against further proceedings in another suit. When, therefore, the case is such as to justify such further proceedings, the bill is dismissed *without prejudice*.

and while the whole case is fresh in the minds of all concerned? Our practice in relation to the entering of the decree is much more simple than the English. We have nothing analogous to their *enrolment*, and of course are not burthened with the distinctions founded thereon. With us a decree is not consummated until its entry in the journal; but then, it can only be altered by the regular action of the court. As the decree must be so shaped as to meet the circumstances of each particular case, no general set of technical forms can be given, answering to all cases, as in judgments at law; but in the books of practice a variety of forms may be found, which can be readily modified to suit any case. In England, the practice is to set forth the facts, upon which the decree is made; but in this state, unfortunately the practice has been to state only the decision of the court, without the facts upon which it is founded; so that the decree contains nothing on its face to show whether it is correct or not; and if it become necessary to review the proceedings, in the manner to be explained hereafter, you have to go behind the decree, and examine the whole case over again. It is much to be regretted, that so loose a practice should ever have obtained a footing. A good practitioner will not imitate it; but on the contrary, will be specially careful to state in the decree all the facts which go to sustain it. Then, a mere inspection of the decree itself, will show the principles decided; and the decree will be held to be as conclusive of the facts therein contained, as is the verdict of a jury. The effect of a decree is declared by statute to be the same as of a judgment at law. It is further declared that a decree for a conveyance, release, or acquittance, if the same be not performed, shall be tantamount thereto. In fact, it is a general and salutary rule that whatever chancery has decreed to be done, shall be considered as done. The court have express authority to *enforce* their decrees, either by *attachment* of the person, or *sequestration* of property; and if necessary, they may issue the same final process of execution as on a judgment at law; and the same rules will govern the officer charged with carrying it into effect. If however from neglect of parties or any other cause, it become impossible to carry a decree into execution without further aid from the court, a bill may be filed for that purpose, and the aid will be given. Such then is the effect of a decree, if its natural operation be not prevented; and this, supposing the decree fairly obtained, can only be done in three ways; namely, by a *re-hearing*, by *appeal*, and by *review*, which will be described in their order.

Re-hearing. If a party conceive himself aggrieved by a decree, he may apply for a *re-hearing*, which is analogous to a *new trial* at law. The application is by *petition*, which must be filed within *thirty days* after the rendition of the decree. The petition must recite the substance of the original bill and subsequent proceedings, and specify wherein the party considers him-

self injured, concluding with a prayer that the cause may be *re-heard*. It may be *allowed* by any two judges of the common pleas, or any single judge of the supreme court, who made the order objected to. The petition is then filed with the clerk, who issues process as in other cases; and proceedings on the decree are thereby stayed. This is the proper course to be taken, if you wish a decree once entered to be altered in the minutest particular. On a re-hearing, the cause is wholly open, with respect to the party in whose favor the decree was rendered; but with respect to the other party, it is only open, as to those parts of the decree which are complained of in the petition. New evidence on the merits, which might have been had at the hearing, is not admissible at the re-hearing; for this would encourage negligence. But evidence duly taken, though not read; or evidence as to *new matter* not then prepared for hearing; or evidence to impeach a former witness, is admissible. If the time for a re-hearing be suffered to elapse without application, one of the other methods must be resorted to; for the court has no discretion to enlarge the time. The reason for withholding this discretion is, that the party will not be entirely without remedy, if the thirty days be suffered to pass by; for, as will be seen hereafter, he may still resort to a *bill of review*, for nearly all matters which would authorize a re-hearing.

Appeal. By our statute an appeal lies of course to the supreme court from "*any decree*" rendered in the common pleas; and since 1831, this has been the only method of bringing up a chancery cause from one to the other. Prior to that time, there was an anomalous proceeding, *by writ of error*, founded on the language of former statutes, which happened to allow "*final decrees*," as well as *judgments* to be re-examined upon writ of error. But in the act of 1831, the word "*decrees*," is omitted; and consequently a writ of error, for which there is obviously no occasion, no longer lies to a decree in chancery. The appeal may be from "*any decree*." This would include interlocutory as well as final decrees. But there is another provision which seems to confine the appeal to a final decree. We have no distinction like that in New York; and it is doubtful, therefore, how far an appeal here from a final decree, would open prior interlocutory decrees. The better opinion is, that an appeal opens nothing for the court above, but the particular order or decree appealed from. Indeed our practice allows an appeal from *part of a decree*, when we are satisfied with the rest; and this is not understood to open the whole decree, because both parties often appeal from different parts of the same decree. If then an appeal from part of a decree, does not open the whole decree, much less would an appeal from a whole decree open prior decrees. It follows, therefore, that if you are dissatisfied with any interlocutory decision of the court, you must appeal from it at once, and

not wait for the final termination of the suit. The course of proceeding to perfect an appeal is the same in chancery as at law. Notice of appeal must be given during the term, and entered on the journal; and within *thirty days* after the end of the term, the appellant must give *security* in double the amount of the decree appealed from, to abide the event. The appeal being thus perfected, the clerk makes out a transcript of the proceedings, which, together with the original papers, he transmits to the clerk of the court above. The effect of an appeal is to suspend the operation of the decree, or part appealed from, except as to its lien upon real estate. The cause goes to hearing in the court above, on the pleadings presented to the court below; unless upon terms leave be granted to amend. If the plaintiff be the appellant and do not recover more than in the court below, exclusive of new costs and interest, he must pay costs. If the defendant appeal, and the plaintiff recovers as much or more than before, exclusive of new costs and interest, the defendant must pay costs. It follows from what has been said, that if your failure to obtain a satisfactory decree, arose from the want of evidence which might have been procured, your only course is to appeal; since you cannot, on this ground, obtain a re-hearing or review; but you may, after appeal, take as much testimony as you deem necessary, without the qualification that it must be newly discovered. The time given for appeal, you will bear in mind, is the same as for a re-hearing, namely thirty days. If therefore you suffer this time to elapse without resorting to either of these, your only recourse will be a bill of review, which I am next to describe.

Review. The only remaining method of avoiding the effect of a decree is by a *bill of review*. It is in the nature of a writ of error *coram nobis*, being filed in the same court which renders the decree, to procure an alteration or reversal of such decree. It may be filed by any party to the decree, or his representatives, at any time within *five years* from the date of the decree; or in case of disability, five years from the removal thereof. It may be founded either upon errors appearing on the face of the record, or upon new matter discovered since the decree. In the former case it may be filed as a matter of course; in the latter, by leave of the court. And on application at the term, to which the bill is filed, the court will order proceedings to be stayed upon the original decree. It is at their discretion to require security or not. By the English practice, the court look only to the decree, on a bill of review for error in the record, and will not examine the evidence over again; but in this state, owing to the facts not being inserted in the decree, the court are required to re-examine the whole case. This fact sufficiently demonstrates the incorrectness of our practice, in not stating in the decree the facts upon which it is made. The bill of review must carefully recite the substance of all the former proceedings, and specify particularly the matters

objected to; for the court will examine no error which is not specified in the bill. All the original parties must be made parties to this proceeding; and they may set up any relevant matter in defence, whether contained in the former proceedings or not. If the bill be founded on *new matter*, it must be such as the party could not have availed himself of, when the former decree was rendered; and it will not be sustained after a demurrer allowed to a former bill of review; nor where the original decree was rendered by the consent of parties. You will thus perceive, that in our practice, the chief difference between a rehearing and review, is in the time within which they may be prosecuted; for if there be any matters which can be revised in one, and not in the other, they are very few.

Limitation of suits. (a) We have already seen that courts of equity are not within the strict letter of the statute of limitations, though they are uniformly governed by its spirit. Indeed the general rule is, that a claim which would have been barred by the statute, if sued at law, will equally be barred in equity by lapse of the same time, and vice versa. Thus an equitable title to land will not be enforced, when an action of ejectment would be barred by the statute. So a court of equity will not compel an account, when the statute has barred the remedy at law. The case of dower in this state furnishes an illustration in point; for it has been held that the petition must be filed within twenty-one years from the death of the husband, because this is the limitation in ejectment. But while the general rule is as above stated, it is not universal. There are cases where equity has held a party barred by lapse of time, when the statute would not have been a bar, because the circumstances evinced gross laches without any excuse. And on the other hand there are cases where a much longer time than the statute has not been held a bar, because the party has shown a good excuse for his delay. But a strong case must be made to induce a court of chancery to depart from the statute either way.

Survivorship. Our statute provides that when either party dies, during the pendency of a suit in chancery, the same may be *revived*, for or against the representatives of the deceased, in the same manner as a suit at law. Now, a suit at law does not abate by the death of either party; but such death being suggested, a *citation* issues, if need be, to the representatives, and the suit proceeds to judgment. It would seem, therefore, that in this state, the same course may be taken in chancery proceedings. But the usual practice is to file a *bill of revivor*, setting forth the

(a) 1 Story on Equity, 73, 502; Bigelow v. Bigelow, 6 Ohio, 96; Tuttle v. Wilson, 10 Ohio, 24; Fahs v. Taylor, 10 Ohio, 104; Ridley v. Hetman, 10 Ohio, 524; Kane v. Bloodgood, 7 Johns. Chy. 90; Piatt v. Vattier, 9 Peters, 405; Hovenden v. Annesly, 2 Sch. & Lef. 607; McKnight v. Taylor, 1 Howard, 161; Bowman v. Wathen, ib. 189.

original proceedings, and the cause of abatement; and praying that the suit may be revived, and stand in the same condition as if the death had not occurred. If other new matter be set forth, it is then called a bill of *revivor and supplement*, and the books abound with shadowy distinctions on this subject. Thus, they speak of supplemental bills, bills of revivor, bills of revivor and supplement, bills in the nature of a bill of revivor, bills in the nature of a supplemental bill, and so on. But these distinctions serve only to perplex the mind, without any use whatsoever. The general rule is, that in drawing a bill which is not *original*, the proceedings on the original bill must be substantially set forth in the first place; and then any new matter may be added, which has made the subsequent bill necessary, by what name soever the latter may be called. This single direction will be a sufficient guide in the construction of any secondary bill whatsoever.

Complete record. (a) The statute provides that when a chan-

(a) *Form of a complete record in chancery.* Proceedings in chancery before the court of ———, within and for the county of ———, and state of ———, on the ——— [date of final decree], in a certain cause, wherein ——— is plaintiff, and ——— is defendant. Be it remembered that heretofore, to wit, on the ———, the said complainant filed in the office of the clerk of said court a certain bill in chancery, in the words and figures following, to wit: [here copy the bill and exhibits]; and thereupon the following subpoena was issued out of the said clerk's office, to wit: [here copy the subpoena]; and afterwards, to wit, on the ———, the sheriff of said county returned the said subpoena indorsed as follows, to wit: [here copy the sheriff's return]; and afterwards, to wit, on the ———, the said defendant filed in the said clerk's office a demurrer to said bill, in the words and figures following, to wit: [here copy the demurrer]; and afterwards, to wit, on the ———, the said complainant filed in the said clerk's office a joinder in demurrer, in the words and figures following, to wit: [here copy the joinder]; and afterwards, to wit, at the ——— term of said court, on motion of the said ——— this cause was continued. And afterwards, to wit, at the ——— term of said court, to wit, on the ———, this cause came on to be heard upon the demurrer to the said bill, and was argued by counsel; and the court overruled the said demurrer with costs; and thereupon, the said defendant moved the court for leave to answer the said bill, and filed in the said clerk's office an affidavit, in the words and figures following, to wit: [here copy the affidavit]; and thereupon leave was granted to answer the said bill in ——— days, and the cause was continued. And afterwards to wit, on the ———, the said defendant filed in the said clerk's office an answer to the said bill, in the words and figures following, to wit: [here copy the answer and exhibits]; and afterwards, to wit, on the ———, the said complainant filed in the said clerk's office exceptions to the said answer, in the words and figures following, to wit: [here copy the exceptions]; and afterwards, to wit, at the ——— term of said court, to wit, on the ———, this cause came on to be heard upon the exceptions of the said answer, and was argued by counsel, and the court overruled the said exceptions, with costs; and thereupon the said complainant filed in the said clerk's office a replication to the said answer, in the words and figures following, to wit: [here copy the replication]; and afterwards, to wit, on the ———, the said complainant filed in the said clerk's office certain depositions, in the words and figures following, to wit: [here copy the depositions]; and afterwards, to wit, on the ———, the said defendant filed in the said clerk's office certain depositions, in the words and figures following, to wit: [here copy the depositions]; and afterwards, to wit, on the day and year first aforesaid, this cause came on to be heard upon the bill, answer, exhibits, replication, and testimony, and was argued by counsel; and thereupon the court found that &c. [set forth the facts

cery cause has been finally determined, the clerk shall enter together in order, the bill, answer, pleadings, exhibits, reports, decretal orders, statement of facts found by a jury or agreed by the parties, and the decree, in a book kept for that purpose, which shall be signed by the court at the next term, as of the day on which such decree was pronounced. Of course this record must be made up in the first vacation after the final decision. But as the purpose and effect of such record are the same as of the record of proceedings at law, no further comment is necessary. I would, again, however, repeat the observation that it would be a most useful exercise, to make up for yourselves a complete record of all the proceedings in a chancery suit, and repeat the operation until you become perfectly familiar with all its parts.

§ 227. *Subjects of chancery jurisdiction.* I have now fulfilled my purpose in relation to chancery practice. I have exhibited an outline of the proceedings in a cause, from its commencement to its final termination. To have entered more into detail, would only have perplexed the memory. The sketch now presented is sufficiently full to illustrate the philosophy of chancery practice, and to mark the wide difference between these proceedings, and proceedings at law. We are now prepared to understand the reasons why the court of chancery, by a course of gradual usurpation, acquired its present widely extended, and most beneficial jurisdiction. The two leading principles upon which this jurisdiction depends, have already been referred to: namely, the absence of an adequate remedy at law, and the existence of an enactment or precedent suited to the case. But I am now to consider the leading subjects, to which, in conformity with these principles, this jurisdiction extends. These subjects have usually been divided into three classes; namely, *first*, those in which the jurisdiction is *exclusive* of the courts of law; *secondly*, those in which it is *concurrent*; and *thirdly*, those in which it is *assistent*. But I have thought that the most simple course would be, to take up these subjects in some convenient order, without reference to the above classification; and in commenting on each, to specify the character of the jurisdiction exercised over it. To ascertain what subjects are embraced under chancery jurisdiction, we must refer, first to the *statutes*, which confer special jurisdiction in several cases; and secondly, to the *precedents*, or *usages*, which settle the question of jurisdiction in all other cases; and I shall take occasion to describe several matters, the proceedings in which are analogous to those in chancery, though not strictly chancery proceedings. In our preceding discussions relating to persons and property, it was inevitable that I should make fre-

found by the court;] and thereupon the court ordered and decreed that &c. [set forth the decree].

The certificates are the same as those appended to the complete record in law; to be found in a preceding note.

quent reference to the subjects which I am here to consider. But we shall now have the advantage of viewing them in connexion. I shall first speak of those for which there is special statutory provision, and then of those which depend upon precedent.

1. *When title is disturbed.* (a) When one person has the *legal title and possession of land*, to which another sets up a *claim of title*, by our statute the possessor may file his bill against the claimant setting forth these facts, and praying that his title may be quieted; and if he establish his title, the defendant will be decreed to release his claim and pay the costs: or if the defendant succeed in making good his claim to a better title, the court will decree a conveyance by the plaintiff to him, with costs. If, however, the defendant disclaim any interest, the plaintiff having thus attained his object, must pay the costs. It has been decided that the assertion of a judgment lien upon land in the possession of another, is a claim coming within this provision. In cases of this kind, it is clear that the plaintiff is without remedy at law; because, being in possession, he cannot bring an ejectment to try his title. A chancery proceeding is, therefore, the only method of quieting his title; and this is sometimes called a *bill of peace*.

2. *When a debtor absconds.* When a person has a *suit* at law or in chancery, for the recovery of money or damages, *pending* against a non-resident or absconding defendant, or one who secretes his property, by our statute the plaintiff may file his bill, setting forth these facts with an affidavit of their truth, against any person who is indebted to the original defendant, or who is in possession of any personal property belonging to him; and the court will *enjoin* such person from paying over such debt, or parting with such property, until the original suit shall have been disposed of; so that if the plaintiff prevail in that suit, he will have this fund to satisfy his judgment. The defendant in this suit, from the service of the subpœna, becomes a *trustee* or *garnishee* for the plaintiff, and is responsible to him for the debt or property. This remedy, it will be perceived, differs from the legal remedy by *attachment*, in this, that here a suit is already *pending*; whereas an attachment is itself the commencement of a suit. This proceeding can only be resorted to when the original suit would *survive* in case of the death of either party; because, in no other case, would it be proper to allow the plaintiff to proceed at once against the property of the original defendant; but then it provides for an important case, in which, on account of the pendency of the original suit, there could be no adequate remedy at law. The reason for requiring an affidavit in this case is, that the court are required to act before hearing the other party.

(a) See *Douglass v. Scott*, 5 Ohio, 194.

3. *When execution cannot be levied.* (a) When a judgment or decree has been obtained against a debtor, who has no real or personal property *subject to execution* at law, by our statute the plaintiff may file his bill setting forth these facts, and praying to subject to the payment of such judgment or decree, any property or effects of the defendant, not liable to execution; including, *first*, all equitable interests in real estate, of whatever nature; *secondly*, all shares in joint stock companies; *thirdly*, all choses in action, or debts due or to become due to the defendant; and, *fourthly*, all effects in the hands of third persons, belonging to the defendant. These four classes comprehend all kinds of property not liable to execution, with the exception of certain privileged articles before alluded to; and thus the plaintiff has a remedy in equity, when he could have none at law.

4. *Ne exeat.* (b) When one person wishes to prevent another, who is equitably indebted to him without security, from leaving the state until he shall have given security, by our statute, as well as by general usage, he may file his bill, alleging such indebtedness and intended departure, and praying for a *writ of ne exeat* against the defendant. The bill must be verified by affidavit, because it requires the immediate action of the court. In term time, it may be *allowed* by either court, and in vacation, by any judge of the supreme court, or by the president judge of the common pleas. The court or judge allowing the writ, determines the amount in which *security* shall be given to the plaintiff; and the writ then issues in place of a subpoena. After reciting the cause of complaint, it commands the sheriff to cause the defendant to give him security, in the specified sum, that he will not depart out of the state without leave of the court; and in default thereof to commit him to jail, and return his proceedings forthwith. If the defendant, by his answer, satisfy the court that there is no reason for such restraint, or give security to perform the decree, the writ will be discharged. This writ, you will observe, is in the nature of equitable bail, and the general rule is that it will not be granted, when the plaintiff could have bail at law. As it operates in direct restraint of personal liberty, the court will require a very strong case to be made before they will interfere. It would seem that the bill must be explicit, as to the *indebtedness* of the defendant; his *intention* soon to leave the state, evinced either by threats or other significant indications; and the *danger* thence resulting to the plaintiff's claim. Nor must the debt be dependant on a contingency; it must be *certain*. If these facts exist, and the debt be an equitable one, there being no remedy at law, this writ may be applied for. And there are

(a) See *Gilmore v. Miami Exp. Co.*, 2 Ohio, 294; *Douglass v. Huston*, 6 Ohio, 156; *Piatt v. St. Clair's heirs*, 6 Ohio, 227.

(b) See *Beame's Ne Exeat*; 2 Story on Equity, chap. 40; 1 Newland, 234; Wilcox, 318.

two cases in which this writ will be granted upon merely legal claims. The first is the case of alimony decreed to the wife. The second is that of an account, where the defendant admits a balance due the plaintiff, but the plaintiff claims a greater balance.

5. *Injunction.* (a) Where one person is in danger of receiving irreparable injury from another, if not prevented by immediate interference, by our statute, as well as by general usage, he may file his bill, praying for an *injunction* against the defendant; and the injunction may be allowed in the following cases:—1. To prevent or stay the commission of *waste*. What waste is, has been before considered. In this case, the *allowance* of the injunction may be made by the supreme court, or any judge thereof; and by the common pleas, or any president judge thereof. 2. To stay proceedings of the courts of law, at any stage thereof, either before or after judgment. In this case, the allowance may be made by either of the courts, or any judge thereof; but the supreme court or one of its judges will not allow an injunction in this case, unless the matter in dispute be of sufficient value to give original jurisdiction to the common pleas; that is, one hundred dollars; nor will the latter, unless the value amount to twenty dollars. The bill must be verified by affidavit; and the plaintiff must give a bond of *indemnity* to the defendant, in such sum as the court or judge shall determine, to be approved by the clerk, before the injunction can take effect. The clerk then indorses on the *subpœna*, “injunction allowed and bail given;” and this is declared to supersede the necessity of a *writ of injunction* in such case. If the effect of the injunction be to stay the collection of money, and it be dissolved in the common pleas, the decree for the defendant will embrace a penalty of five per cent. besides the original judgment, interest, and costs: and if the plaintiff appeal therefrom, and fail, the penalty will be doubled. If the money has been actually collected by the officer, but not paid over, he must pay it back again, upon the allowance of the injunction, unless the court otherwise order; and upon refusal so to do, he may be *amerced*, as in other cases. 3. In all other cases where it is usual for courts of equity to interfere by injunction. In these cases, the bill must be verified by affidavit, and may be allowed upon such conditions, as the court may think proper to annex. The most usual cases coming within this class are:—To restrain the infringement of copyrights and patents; to prevent the transfer of negotiable paper or stock; to prevent nuisances, and to prevent irreparable injury of any description. Bills of injunction do not differ in form from other bills, except in the additional prayer, that the defendant may be enjoined from doing the act complained of. It would seem as if

(a) See 2 Story on Equity, chap. 23; Eden on Injunctions; 1 Newland, 212. Putnam v. Valentine, 5 Ohio, 188.

the only case where an affidavit is not required by the statute, is where the injunction is to stay *waste*; and this is probably an accidental omission; for the general principle is, that whenever the immediate action of the court is asked, without hearing the other party, the bill must be verified by affidavit. Security is not expressly required, except in case of injunction to stay legal proceedings, but may be ordered whenever the court see proper. The only case where an associate judge of the common pleas can allow an injunction, is to stay legal proceedings. On coming in of the demurrer, plea, or answer to the bill of injunction, the defendant may move to *dissolve* the injunction, and have a hearing at once on that question. If this motion fail, the cause will take the usual course; and if on final hearing the plaintiff prevail, the decree will be that the injunction be perpetual. We have seen how obedience to decrees is generally enforced; but the statute has a special provision in reference to *waste* which authorizes either court in term, or any judge of the supreme court, or president judge of the common pleas, in vacation, to enforce obedience by attachment, fine and imprisonment. We have seen that the statute does not prohibit the issuing a writ of injunction in any case; but merely supersedes the necessity of it, where security has been given to stay legal proceedings. Accordingly in all other cases a writ must issue. Its form will be readily imagined without a description. There are two other special cases of injunction authorized by statute; namely, *first*, where a bill has been filed in the second class of cases before mentioned, against the debtor of a non-resident or absconding debtor; and *secondly*, to prevent the collection of a school-house tax illegally assessed: but of these there is nothing peculiar to be said. It will be readily perceived that all cases of injunction come clearly within the principle of there being no adequate remedy at law. The law might perhaps give damages for the injury when done, but has no such preventive power as this, which a court of chancery exerts. Besides, in many cases, damages would be altogether inadequate, even if they were sure to be recovered; and in all cases, it is better, as a general principle, to prevent the injury from being done, than to run the risk of obtaining compensation after it is done. Indeed there is no point of view, in which the exercise of chancery power appears more beneficial and important, than when it judiciously interferes by injunction, to prevent the commission of injuries. It was undoubtedly a very bold movement, on the part of the first chancellor who granted an injunction to stay legal proceedings; and we know as a matter of history, that this interference met with the most strenuous opposition from the courts of law. A long and exceedingly bitter controversy was carried on between the two courts; but the court of chancery ultimately prevailed; and what was at first a clear and manifest usurpation of power,

at last received the sanction of the king and parliament, on account of the obvious utility of its prudent exercise. In fact, were there not a power lodged somewhere to stay legal proceedings, the benign purposes of justice would often be so perverted, that remedies would become in themselves injuries.

6. *Contesting of wills.* (a) When the heir of a deceased ancestor or any person interested, wishes to contest the validity of a *will*, after probate, there being no law proceeding for this purpose, our statute allows him to file his bill in chancery; and thereupon an issue is made up for a jury to try whether the writing produced be the last will of the testator, or not. The mode of making up this issue has been determined by the court, as we have before seen. The verdict of the jury is final, unless a new trial be granted, or there be an appeal to the supreme court. We have before seen, when speaking of the *probate* of a will, that the testimony is taken down in writing and filed with the will. On the trial before the jury, this testimony may be used, if the witnesses cannot be produced. The time limited for contesting a will, is two years from the probate; and in case of *disability*, two years from the removal thereof; and in this one instance, probably from inadvertence, *absence from the state* is mentioned as one of the disabilities. In all other cases, we have seen that it has ceased to constitute a disability.

7. *Mortgages.* (b) The nature of mortgages has been already explained. We have seen that their present legal character is derived from the doctrines established by the court of chancery; and that the most efficient remedies both for mortgagor and mortgagee, are in chancery. 1. If the debt be not paid at maturity, the mortgagee may file his bill of foreclosure, setting forth his claim, and making the mortgagor and all persons interested parties; and may thus procure a sale of the land for the payment of his debt, according to its priority. The decree should be so drawn as to give the mortgagor a short time within which to prevent a sale by payment. The sale may be made by the sheriff or master, as the court may direct, and the proceedings are the same as in sales on execution. 2. If the mortgagee have obtained possession of the land, in any other way than by foreclosure, the mortgagor may file his bill to redeem the land, by paying the debt and interest; and the court will decree accordingly. The limitation in both cases is the same as in ejectment, namely, twenty-one years. It may be well to remark that the original pretext for chancery interference with respect to mortgages, was to prevent a penalty or forfeiture, by substituting a fair compensation. Indeed equity abhors penalties and forfeitures under all circumstances, and as a

(a) See 2 Story on Equity, chap. 29; *Greene v. Greene*, 5 Ohio, 278.

(b) See ante, lec. 25; 2 Story on Equity, chap. 27.

general rule will always interfere to prevent them, in cases admitting of a conscientious adjustment. (a)

8. *Dower.* (b) Where a widow wishes to obtain an assignment of her dower, which has been before described, our statute requires her to proceed by bill in chancery; and thus virtually does away with proceedings at law. The bill sets forth the grounds of her right, describing the tracts of which she claims to be endowed; and the heirs or assigns of her husband are made defendants. If there be any mortgagees or other incumbrancers, they may set up their rights by a cross bill. If the lands lie in several counties, the bill must be filed in that county where the principal messuage of her husband was; and the court may, at their discretion, order the whole dower to be assigned, not only in one county, but in one tract, where it will not prejudice the rights of others. If the land cannot be conveniently divided, dower may be assigned in a special manner, as one third of the rents or income. The decree directs the sheriff to cause the dower to be set off by three disinterested men under oath; and if the court approve of their proceedings, a *writ of seisin* is directed to issue, by virtue of which the sheriff delivers possession to her. The great advantage of proceeding in chancery to obtain dower is, that this court can take into consideration all the circumstances of the case, and do complete justice between all the parties.

9. *Partition.* (c) Where tenants in common wish to obtain a *partition* of the common property, the statute requires the application to be by petition; which is filed in the court of common pleas, if all the land be in one county; but if in several counties, then in either of the courts of either of the counties. The bill sets forth the nature of the petitioner's title, describes the tracts of which partition is claimed, and specifies the name and residence of each of the co-tenants, if known. Also if there be a widow entitled to dower which is not yet assigned, she must be made a party. If any of the co-tenants be minors, their guardians are empowered to act for them. Thus far the course is the same as in other chancery proceedings; but at this point the statute makes a difference; for no subpoena issues. The petitioner has his option, either to give personal notice in writing, of the pendency of the petition, or to advertise the same in some newspaper of general circulation, at least *forty days* before the commencement of the next term; and upon proof of due notice, if no objection be made by the other parties in interest, the court will *order* partition to be made and returned at the next term, and a *writ* will issue accordingly. This writ commands the sheriff to cause the partition to be made by three disinterested freeholders of the vicinity, named

(a) See 2 Story on Equity, chap. 34.

(b) See ante, lec. 28; 1 Story on Equity, 576.

(c) See ante, lec. 23; 1 Story on Equity, 599.

by the court, and acting under oath. They are to take into view the improvements, situation, and qualities of the different tracts, if there be more than one; and if they be not all owned by the same proprietors and in the same proportion, a proper portion of each tract must be set off to each of the co-tenants. It may happen, however, that the land cannot be divided without great injury to its value; and in this case, the three freeholders return an *appraisement* of its value; and if the court approve of the return, and any one or more of the co-tenants *elect* to take the whole at that appraisement, and pay the rest their proportions, the court will order the sheriff to execute conveyances accordingly; but if no such election be made, the court will order a *sale* at public auction, to be conducted in the same manner as sales on execution. Upon return of sale, and approval by the court, they will order the sheriff to execute the deed, and distribute the proceeds among the co-tenants. The sale, however, cannot be made for less than two thirds of the appraisement; unless, after being once offered, the court shall direct otherwise; and if there be a widow entitled to dower, it must be first provided for by the freeholders; who may either include it in one or more of the shares, making them larger in proportion; or may simply divide what remains after setting off dower, and leave that to be divided at a future time. It hardly need be observed, that if the co-tenants can agree among themselves, they may execute deeds of partition, without resorting to the court. In like manner, after the petition is filed, the co-tenants may come into court and agree upon a partition, which, being recorded, will be as valid as any other. As the partition is presumed to be for the benefit of all the co-tenants, the *costs* are usually shared among them; but this rests in the discretion of the court. The order may be that only the share of the petitioner shall be set off, if the rest do not desire partition; in which case, he would of course pay all the costs. If there be any thing to regret in these provisions, it is, that proceedings in partition are not made in all respects chancery proceedings; for questions may now arise, which will occasion much doubt and difficulty, as not coming within the known usages of chancery, and not specifically provided for by statute.

10. *Execution of real contracts.* Where one or more persons have entered into a contract for the sale and conveyance of land, and one of them dies before executing the conveyance, our statute authorizes the executor or administrator of the deceased owner, if there be but one owner, or the survivors, if there be more than one owner, to file a petition in the court of common pleas, praying for an order for the execution of the contract. The petition must name all the persons interested in the contract, and describe the land to be conveyed, with all the circumstances. No subpoena issues; but *notice* must be personally served on the parties interested, or published three successive weeks in some newspaper of

general circulation; and if on hearing the case, the court are satisfied that the contract ought to be executed, they order the executor, administrator or survivor, as the case may be, to execute the deed contracted for. This deed must recite the order, and when duly executed, conveys as good a title as could have been conveyed, if death had not intervened. At the same time the court provide that the proportion of money, which would have belonged to the deceased, shall be secured to his representatives. The same statute provides, in like manner, for the case where the *purchaser* dies before the conveyance is executed. His heirs may file their petition and compel a conveyance to them, in the same manner as their ancestor might have done. It would seem as if this right would have existed without any express provision, on the general doctrines of *specific performance* to be described hereafter. There is another statute, which authorizes the guardians of idiots and lunatics, by application to the court of common pleas, to execute the real contracts of such idiots or lunatics, by making the proper conveyances. The importance of these provisions for cases unprovided for at law, is at once perceived. But here again, we have such a departure from the regular course of chancery proceedings, as is likely to create uncertainty; and for which there is no apparent reason.

11. *Applications to sell land.* When there is not sufficient personal property to pay the debts of a *deceased person*; or when it is necessary for the support, or will be for the advantage of a *minor*, that his real estate shall be sold, our statute authorizes the executor, administrator, or guardian, as the case may be, to file his petition in the court of common pleas, setting forth the facts of the case, and praying for an order of sale. But the course of proceeding in such cases has been sufficiently described before, when treating of executors, administrators, and guardians, and their conveyances. You will again observe, that these applications are not strictly chancery proceedings, although like them commenced by petition.

12. *Divorce.* When a husband or wife wishes to be divorced, for one of the causes before enumerated, our statute provides that the application shall be by petition, filed in the supreme court, setting forth the particular cause. It also declares that proceedings for divorce shall be "*as in chancery*," where the contrary is not specified. We have seen that the proceedings under the three preceding heads, though they commence by petition, as in chancery, and are in other respects more analogous to chancery proceedings than to any other, are, nevertheless peculiar to those subjects; and the same was true of divorce, until the act of 1834 declared that it should be a chancery proceeding. The petition must distinctly set forth the cause of application. If the adverse party reside in the state, a summons and copy of the petition must be personally served, at least six weeks before the term. If out

of the state, there is an option to make personal service, or give two months' notice by advertisement. On the hearing, the confession of neither party can be received as evidence, for fear of collusion. The facts must be proved by witnesses testifying orally in court, if their attendance can be procured; otherwise their depositions may be taken. The marriage itself must be first proved; but evidence of cohabitation, as reputed man and wife, will be sufficient for this purpose. If there be good reason, the court will make an order for the support of the wife during the pendency of the petition; and in the final decree, the support of the wife, and the custody of the children are permanently provided for. Formerly the applicant must have resided one year in the county where application is made; but now it is not even necessary to be a resident within the state.

13. *Perpetuation of testimony.* (a) Where no suit is pending, but it is apprehended that litigation may arise, and that testimony now accessible may then be lost, our statute authorizes the filing of a bill to perpetuate such testimony. The bill must specially describe the subject-matter to which the testimony relates, and name all the parties interested therein, if known; if not, they must be described as well as the case admits of. They are brought before the court as in other chancery proceedings. The plaintiff then files the names of the witnesses, and the interrogatories to be put to each; and the defendant, or if he has not had actual notice, some attorney appointed by the court and compensated by the plaintiff, files cross interrogatories. These are forwarded to the person authorized to take the deposition, who must either be a master commissioner of this state, or some person specially authorized by a *dedimus potestatem*. The witnesses are to answer no other questions than those thus filed. If the court are satisfied that the depositions have been properly taken, they order them to be made part of the record in the cause; and thereafter, the originals or certified copies, may be used in any suit in law or chancery, between the same parties or privies, touching the same subject-matter; provided the original witnesses cannot be had. It is further provided, that if, after filing the bill, it be made to appear that any witness is old, infirm, or about to leave the state, the court may forthwith, before the appearance of the defendant, order his deposition to be taken *de bene esse*, that is, provisionally, to be used if need be. This mode of perpetuating testimony is a chancery proceeding of ancient usage: but it is seldom resorted to in this state, because our statutes provide other methods attended with less trouble, which I will now describe. 1. By the act providing a mode of perpetuating testimony, two associate judges are authorized to take the deposition of any person residing within their county, "to perpetuate the remembrance of any fact, matter,

(a) See 2 Story on Equity, chap. 41.

or thing." They are to cause all persons interested in the subject-matter to be "duly notified," that they may attend and cross-examine. The questions and answers must be reduced to writing. Within sixty days, the deposition, if it relate to land, must be recorded in the recorder's office; if to other property, in the clerk's office: and thereafter, the original or a certified copy may be used "in any cause to which it may relate," if the witness cannot be had. If there be no two associate judges disinterested, two justices of the peace may officiate. If the opposite party was not present at the taking, the deposition is open to all legal objections. 2. By the act enabling landholders to perpetuate testimony, if landmarks be in a "perishable condition," or actually "destroyed," and the owner wishes to plant new ones, he may apply to the county surveyor, who has authority to compel the attendance of witnesses, even from other counties, and take their depositions. All adjoining owners are entitled to twenty days' notice. If non-resident, or unknown, publication must be made. The landmarks are established and a survey made, pursuant to the testimony. The plat and depositions are then recorded; and thereafter, the originals or certified copies may be used as evidence in any subsequent litigation touching the same subject-matter, provided the witnesses cannot then be had.

14. *Discovery.* (a) We have already seen that one of the marked peculiarities of chancery proceedings is, that each of the parties is entitled to the testimony of the other under oath. Every bill, therefore, as it requires an answer under oath from the other party, is so far a *bill of discovery*; for while it prays for *relief* as the main object, it calls upon the defendant to discover or disclose the facts upon which the claim for relief rests: but the bill of discovery properly so called, and of which I am now speaking, is that which is resorted to when the discovery is the main object, and no relief is prayed for, but what results from the discovery itself. The cases proper for such a bill, are the two following: 1. Where the plaintiff is entitled to the production of *deeds* or other *writings*, in the custody of the defendant. Formerly courts of law had no power to compel the production of such things, and a bill of discovery was the only resource. But our statute authorizes our courts, in the trial of actions at law, on motion and ten days' notice, to compel the parties to produce books or writings in their possession, in all cases where courts of chancery could compel their production: and if either party refuses, he may be nonsuited or defaulted, as the case may be. This provision has in a great measure superseded bills of discovery to compel the production of books and papers. 2. Where the plaintiff, in a *suit at law*, pending or expected, between him and the defendant, finds it necessary, in order to establish his claim or defence, to avail

himself of *facts* resting solely in the knowledge of the defendant. In such case, he files his bill of discovery to aid the jurisdiction of the court of law, which cannot compel a party to testify. This is a strong illustration of what is meant by the *assistant* jurisdiction of chancery. It enables courts of law to do justice in cases where it would be otherwise impossible. Numerous business transactions will at once suggest themselves, of which none can have any knowledge but the parties themselves. The payment of money, for example, without taking a receipt, may often render it necessary to put the party who received it to his oath; and our statute against gaming specially authorizes the loser to bring an action against the winner, and file a bill of discovery in aid thereof. In fact, until the arbitrary but inflexible rule, that parties shall not be witnesses in courts of law, shall be abolished, this class of bills of discovery must be frequently resorted to. The form of the bill does not differ materially from other bills. It must state enough to show that the discovery is material, and that the facts cannot be otherwise proved. An affidavit is not necessary, unless the bill prays for relief, in addition to the discovery. If the bill be for discovery merely, and the defendant would avoid answering, he may demur; but if the court think the plaintiff entitled to the discovery, they will enforce an answer by attachment and sequestration. If the answer be insufficient, it may be excepted to, until made sufficient. The whole object of the bill is then attained, and there is no decree except for costs, which are always paid by the plaintiff. The answer is laid before the jury, together with the bill, as if it were a deposition, and both parties may avail themselves of it. The party answering cannot be prohibited from using his own testimony, which has been called out by the other party. The doctrine of our court is thus stated. (a) "The bill, if it contain any facts useful to the defendant, is evidence for him against the plaintiff. The answer of the defendant is evidence for him, so far as it is responsive to the call in the bill, or connected necessarily with the responsive matter, or explanatory of it." It will be seen, therefore, that a bill of discovery may be suicidal in its operation; for a dishonest man may thus swear himself clear. It is a well settled principle in equity, that when a court of chancery have obtained jurisdiction of a cause for any purpose, it may be retained for all purposes, in order to avoid a multiplicity of suits. It follows, therefore, that the party who would be plaintiff in an action at law, may, by adding a prayer of relief to that of discovery, avoid the necessity of an action at law: and the consequence is, that bills of discovery in aid of actions at law, are chiefly resorted to by defendants, who cannot choose their tribunal in the first instance.

(a) *Methodist Church v. Wood*, 5 Ohio, 283.

15. *Specific performance.* (a) When a party to a contract refuses to comply with his part of it, the other party, in a court of law, can only recover *damages* for the non-performance. The jury will say how much injury he has sustained, and the court will adjudge that he recover so much in money from the delinquent party. This is the only remedy which courts of law can administer. But a court of chancery is empowered to compel a specific performance of the contract according to its terms; and in the opinion of Lord Hardwicke, this is the most useful head of chancery jurisdiction. The leading rules by which chancery is governed in decreeing a specific performance of contracts are these:—1. The contract must be fair and honest in the outset. The man who asks equity must do equity. The court will always relieve against fraud, but never aid in giving it effect. 2. The contract must be to do some particular and specific thing; that is, to execute a deed, remove an incumbrance, or the like. For if the agreement be general, as to pay money or indemnify against loss, or the like, pecuniary damages would be an adequate remedy, and there is no occasion for resorting to chancery. 3. For the same reason, if the contract relate to personal property merely, as to deliver stock or merchandise, chancery will seldom interfere. Even in such cases, however, if legal damages would be manifestly inadequate, the court will compel a specific performance. 4. The plaintiff must show that he has fully performed his part of the contract, if his performance is to precede that of the other; and if not, that he always has been, and still is ready to perform, when the other has performed. It may perhaps be asked, why there should be any restriction upon the power to decree a specific performance, of any valid contracts? Why may not the party complaining have his option in all cases, to seek redress in chancery or at law? There is certainly no reason, on principles of natural justice, why every man who makes a binding contract, whatever be the subject-matter, should not be compelled to perform it specifically, instead of paying damages, if the other party should so elect. It would seem reasonable that the option should be with the obligee, rather than with the obligor. But the precedents have established the above distinctions; and in so doing, have only followed up the principle of not granting relief in equity, where relief could be obtained at law.

16. *Accounts.* (b) In all matters of account, courts of chancery have concurrent jurisdiction with courts of law. To constitute an account, there must be a series of mutual transactions; for a single dealing will not make an account; nor will several distinct matters all on one side. There must be both *debts* and *credits*; and hence accounts are inconvenient matters to be sub-

(a) See 2 Story on Equity, chap. 18.

(b) See 1 Story on Equity, chap. 8.

mitted to a jury. Twelve men cannot investigate such transactions as well as one experienced accountant. And this is the reason why chancery takes jurisdiction. By referring accounts to a master for adjustment, the most complicated transactions are readily unravelled, and the result presented to the court for adjudication. Accordingly, when parties disagree as to matters of account, or when one refuses to render an account to the other, the proper resort is to chancery. But it is a general rule that a *stated* or *settled* account will not be opened, unless upon a distinct allegation of *fraud* or *error*. If you desire to have an account opened on the ground of error, your application, technically speaking, is for leave to *surcharge* and *falsify*. To surcharge is to supply an item which has been omitted: and to falsify, is to strike out or alter a charge which is wrong. All such corrections should be specified in the bill, that the defendant may be prepared to meet them; and the burthen of proof falls on the plaintiff. If you reflect how great a variety of controversies may involve matters of account among their details, and then remember that when a court of chancery have obtained jurisdiction of a case for any purpose, it may be retained for all purposes, you will readily perceive that this must be a very prolific source of chancery jurisdiction. We have no statutory provision respecting accounts, except that heretofore mentioned, which authorizes a party to swear to his own accounts of not more than eighteen months' standing.

17. *Partnership affairs.* (a) The ground on which chancery originally assumed jurisdiction of partnership transactions, was, that they usually involve matters of account of a complicated character; but jurisdiction is now exercised on many other grounds. The general principles of partnership have been already stated I shall here only refer to the leading occasions of chancery interference. 1. If partnership capital be invested in land for the use of the firm, chancery will treat it as personal property so far as respects the rights of creditors. 2. If a partnership creditor attempt to make his debt out of an individual partner, before the firm property has been exhausted, chancery will prevent him. 3. If a private creditor of one partner attempt to make his debt out of the firm, before all the firm debts have been paid, chancery will prevent him. He can only reach his debtor's distributive share after a final settlement. 4. As one partner cannot sue the firm, and as one firm cannot sue another, at law, when the same person is a member of both; chancery will grant relief, when such occasions arise. 5. In a very strong case, chancery will restrain an unreasonable dissolution of partnership, though there be no agreement to the contrary. 6. When one of the partners becomes insane, or grossly violates his faith,

(a) See ante, lect. 13; 1 Story on Equity, chap. 15.

or the business has become ruinous or impracticable, chancery will enforce a dissolution, though there be an agreement to the contrary; and will appoint a receiver to wind up the concerns.

7. After a dissolution, compulsory or otherwise, chancery will restrain a partner from using the partnership name, for any other purpose than to close the concerns. All these points have been before referred to in the lecture on partnerships; but I have recapitulated them here, because they form an important head of chancery jurisdiction.

18. *Accident or mistake.* (a) As no human prudence or sagacity can at all times guard against contingencies, it is right that there should be means of obtaining relief against the hardships they may occasion. Yet courts of law have little latitude in this respect; for their rules are generally inflexible and must be rigorously enforced: but not so with courts of chancery: one of their most beneficent functions is to rectify mistakes and relieve against accidents; and I shall refer to the leading occasions of interference. 1. When a written instrument or security has been concealed or lost, chancery will aid in discovering it; and when this cannot be done, will, if possible, supply its place. 2. When the performance of agreements or conditions becomes impossible by the act of God, chancery will relieve against the consequences of non-performance. But generally speaking death is not one of the accidents which lays the foundation of such relief. 3. When an instrument or power has been defectively executed or conferred, chancery will supply the deficiency according to the intention of the parties; but this of course does not extend to judicial mistakes. 4. When powers created by will cannot be executed literally, chancery will direct them to be executed as nearly as may be. This is technically called the doctrine of *cypres*. But the mistakes relieved against are chiefly in matters of fact; for chancery seldom relieves against mistakes in law. 5. Chancery will not relieve a person, who has mistaken or lost his defence at law, whether it be from negligence or ignorance: it never aids negligence, and seldom ignorance. These rules sufficiently illustrate the limits of chancery jurisdiction over accidents and mistakes. Perhaps they may all be reduced to this one general principle, that chancery will always relieve a person against the consequences of any accident or mistake, not occasioned by his own fault, when such relief will not do injustice to third persons.

19. *Fraud.* (b) Fraud signifies any kind of artifice, surprise, trick, cunning, dissembling, or misrepresentation, by which another is cheated or deceived, to his pecuniary damage. The law, as before observed, abhors fraud as much as equity does;

(a) See 1 Story on Equity, chap. 4 and 5.

(b) See 1 Story on Equity, chap. 6, 7.

but chancery possesses by far the most efficient means of detecting and relieving against it. Both its preventive and searching powers are often beneficially exerted for this purpose; and I shall refer to the leading rules established on this subject. 1. Chancery takes special cognizance of all persons in confidential relations, as trustees, guardians, executors, and the like; and prevents them from taking advantage of those whose interests are committed to their keeping. 2. When a person has a right liable to be controverted by different persons in different actions; or where there have been repeated attempts to litigate the same question, as in ejectment, chancery will take jurisdiction, and effect a final adjustment. The bill filed in such case is called a *bill of peace*; (a) which may always be resorted to in order to avoid a multiplicity of suits. 3. When two or more persons claim the same debt or duty from a third, and the latter knows not to which of them he ought to render it, chancery will compel the claimants to have their respective rights determined by judicial decision, and the bill filed in such case is called a *bill of interpleader*. (b) The case of a stake-holder furnishes a familiar illustration. 4. When a person is apprehensive of being subjected to future inconvenience, by the neglect, inadvertence, or culpability of another, he may resort to chancery to have his apprehensions quieted. The bill filed in such case is called a bill *quia timet*. (c) The case of a bill to prevent the executor of a deceased debtor from misapplying the assets, is a familiar illustration. 5. Where one creditor has a debt secured by two distinct funds, and another creditor of the same debtor can resort to only one of these funds, chancery will compel the former to resort first to the fund which the latter cannot touch. This is called *marshalling securities*. The foregoing rules sufficiently illustrate the power of chancery to prevent fraud. There are others designed to relieve against it when committed. Thus if an award, verdict, judgment, or decree, be fraudulently obtained, chancery will always set it aside; for the doctrine is, that fraud shall have no sure asylum, even in the most solemn determinations known to the law. But fraud most frequently occurs in contracts; and there the general rule is, that fraud vitiates every thing it touches. We have already examined the statute for the prevention of frauds; but chancery will relieve against many contracts which do not necessarily infringe that statute; and the following rules apply to such cases. 1. It makes no difference whether the fraud affects the whole contract or only a part. Chancery will not undertake to apportion fraud; the contract will not be sustained in part, and set aside in part. It must stand or fall together. This is the language commonly used; but I see no good reason why in chancery a contract may not be

(a) See 2 Story on Equity, chap. 22.

(b) See 2 Story on Equity, chap. 20.

(c) See 2 Story on Equity, chap. 21.

upheld in part, and rescinded in part. In law there is a technical reason; but a decree can rise above technicality. 2. It makes no difference whether the fraud arise from a suppression of truth or assertion of falsehood. If an unfair advantage be obtained in either way, chancery will relieve against it. 3. Chancery will sometimes relieve a party who was ignorant of his rights at the time of contracting, though no fraud was intended by the other party. But mere mental imbecility, whether resulting from old age or intoxication, will not be sufficient to set aside a contract, without some proof of actual imposition. On this point, however, there is some doubt. 4. When one person stands silently by, and sees another purchasing or improving property under a mistaken belief of title, which he might correct, this very silence will be treated as a fraud. 5. Mere inadequacy of consideration will not be proof of fraud. It must either be so palpably gross as to create a violent presumption of imposition; or there must be proof of actual imposition. But as against creditors and subsequent purchasers, a total want of consideration, will avoid any contract. 6. When a contract contains a stipulation by way of *penalty* or *forfeiture* for non-performance, chancery will relieve against it by confining the other party to reasonable damages. But if the stipulation, though in form a penalty, be in fact an agreed liquidation of damages between the parties, chancery will not interfere. Formerly the only relief in such cases was in chancery; but we have seen that our statute furnishes a complete remedy at law upon all penal contracts, by allowing the party, while he takes judgment for the entire penalty, to have execution for only so much as a jury shall find in their verdict. 7. In sales at auction, where all the bidders except the purchaser, are merely puffers employed to enhance the price, the sale will be set aside as fraudulent against the buyer; but if there be real bidders in competition, the mere fact of employing a puffer, will not render the sale fraudulent. Also when the bidders enter into a combination not to bid against each other, in order to buy cheap and share the profits, the sale will be treated as fraudulent against the seller. The design of a sale at public auction is to produce fair competition, that property may bring what it is worth; and whatever tends to prevent such competition, is treated as a fraud.

20. *Trusts.* The nature of trusts, and of the chancery jurisdiction exercised over them, has already been sufficiently discussed in the lecture on equitable estates. Had we time to go back to the history of uses and trusts, we should find that in the early struggle between law and chancery jurisdiction, the latter sustained itself more, on account of its salutary power over trusts, than for all other reasons put together. I recur to the subject here, merely for the purpose of filling up the enumeration of the subjects of jurisdiction. The proceedings must of course be as various as the nature and objects of the trust may require. The

general principle however is, that courts of law have no power to superintend the execution of trusts; but all persons acting in the capacity of trustees, are amenable to courts of chancery, at the instance of any person aggrieved; and it makes no difference whether the trust is express or implied; both being equally and exclusively the subjects of chancery jurisdiction.

21. *Personal relations.* As a general rule, courts of chancery in this country have very little concern with personal relations, as will be obvious from the view heretofore taken of these relations. There are, however, some exceptions, with respect to infants, idiots, and lunatics, married women, apprentices, and slaves, on account of the comparatively helpless condition in which they are placed either by nature or by law, and the peculiarly confidential relations which they sustain towards other persons; though probably all the occasions of chancery interference, where these relations exist, may be referred to one of the three heads of injunction, fraud, or trust. And the same may be said with respect to the jurisdiction which chancery exercises over corporations, particularly of a charitable kind. I shall not therefore take up time with repeating what has been sufficiently explained under preceding heads. Here then terminates our view of chancery proceedings. My object has been to place before your minds a general but distinct outline of these proceedings, without perplexing your memory with details. If I have succeeded in this attempt, you are probably ready to concur with me, in the remarks with which I commenced, as to the immense superiority of these proceedings over proceedings at law. Not only are they so much more simple, that they may be understood in perhaps one tenth part of the time required by the latter, but the remedies they furnish are more convenient and efficient, in about the same proportion. What an admirable system of remedial law might therefore be formed, by an amalgamation of the two systems together, so as to apply the forms of chancery procedure to the principles of law and equity combined!

LECTURE XXXIX.

CRIMINAL PROCEEDINGS. (a)

§ 228. *Preliminary considerations.* We come now to the last division of the law of procedure, which embraces the course

(a) See Archbold's Criminal Practice; Starkie's Criminal Practice; Davis's Precedents; and the works of Chitty and Russell.

of proceeding in criminal prosecutions from the commencement to the conclusion. The general nature of crimes and punishments, and the offences which are punishable by the state and federal laws, have already been considered. The constitutional limitations of the power of punishment have also been discussed, as immediately connected with personal liberty. It only remains, then, to describe the mode in which criminal justice is administered; and here the distribution of criminal jurisdiction among the federal and state courts, would be the first topic; but this has been sufficiently explained in the lecture upon the judicial department. We are therefore prepared to turn at once to the commencement of criminal proceedings; but first I would observe, that although the outlines of these proceedings are marked out by the federal and state constitutions, and the statutes pursuant thereto; yet the *terms* usually employed in these provisions, and the *forms* required by them, are chiefly taken from the common law; and their meaning and nature are to be sought in the treatises on criminal law, before referred to. It follows that criminal proceedings must be much the same in all courts where the common law prevails; and accordingly I shall confine myself chiefly to a description of them in this state. Criminal proceedings are much less complicated than civil, as will be evinced by what follows. Mean time there are some preliminary matters, which require a brief notice. When an offence has been committed, the first step is to *secure the offender*; and to this end certain officers are designated to be *conservators of the peace*. By the constitution, judges of the supreme court are conservators of the peace throughout the state; president judges of the common pleas, throughout their circuits; and associate judges of the common pleas throughout their counties. By statute, it is made the duty of sheriffs to preserve the public peace; to cause all persons guilty of breaking the same, within their knowledge or view, to enter into recognizance to keep the peace, and to appear and answer in court; and to commit to jail in case of refusal. Coroners have the same power when the office of sheriff is vacant, or the sheriff is himself the offender; with the further power of holding inquests over dead bodies, and arresting persons charged by the jury with being concerned in the death. Also, by statute, justices of the peace are declared to be conservators of the peace throughout their counties; and it is made the duty of constables to apprehend and bring to justice felons and disturbers of the peace; to suppress riots and preserve the peace within their counties; and to pursue fugitive offenders into other counties. From all which it appears, that judges, justices, sheriffs, coroners, and constables are made the official guardians and protectors of public tranquillity and private security; but the chief burthen, as we shall see, falls upon justices and constables, whose functions are therefore of the highest importance to the community.

§ 229. *Warrant.* In general, before an offender can be *arrested*, or his premises *searched*, the officer must have an official warrant for that purpose; and we have before considered the constitutional guaranty against unreasonable searches and seizures, which is expressed in these words;—"the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." For making arrests there are two kinds of warrants, which I will briefly describe.

1. *A capias upon indictment.* What an indictment is, will be explained hereafter. If the grand jury happen to be in session, when an offence is committed, or before the offender is apprehended, any person may go before them and testify against him; and if upon such testimony an indictment be found, the prosecuting attorney will take out a *capias ad respondendum*, for his arrest. This writ may issue in term-time or vacation, to any county in the state, commanding the offender to be arrested for trial. If the arrest be made in term-time, he is forthwith arraigned. If in vacation, he is either held to bail or committed; all which will be explained hereafter.

A state warrant. (a) If the offence be committed under such circumstances that it cannot be laid at once before the grand jury, as is most frequently the case, the course is to procure a warrant, commonly called a *state warrant*, commanding the *arrest* of the

(a) *Affidavit.* The State of ———, County of ———. Before me ———, one of the justices of the peace for said county, personally came ———, who being duly sworn according to law, deposeth and saith, that on or about the ———, at ———, [here describe the crime committed and the premises to be searched, if such there be], and that one ——— is guilty of the fact charged; and further saith not.

Warrant for arrest. The State of ———, County of ———. To any constable of said county. Whereas complaint has been made before me, ———, one of the justices of the peace for the county aforesaid, upon the oath of ———, that ———, late of the county aforesaid, did, on or about the ———, at ——— in the county aforesaid, [describe the crime]; these are therefore to command you to take the said ———, if he be found in your county, or if he shall have fled, to pursue him into any other county within this state, and take and safely keep him, so that you have his body before me or some other justice of the peace, forthwith, to answer the said complaint, and be further dealt with according to law.

Search warrant. Whereas it appears to me ———, one of the justices of the peace for the county aforesaid, that the following goods and chattels, to wit: [here describe them], have been, within ninety days past, by some person or persons feloniously taken, stolen, and carried away from the premises of ——— of said county, and that the said ——— doth on oath declare that he verily believes that the said goods and chattels are concealed in the [describe the place of concealment] of one ——— of ——— in said county; these are therefore to command you, with the necessary and proper assistance to enter, in the day time, into the said [describe the place as before] of the said ———, and there diligently search for the said goods and chattels; and if the same or any part thereof be found upon such search, that you bring the goods so found, and also the body of the said ———, forthwith before me, or some other justice of the peace of said county, to be disposed of and dealt with according to law.

offender, and if need be, a *search* of any suspected premises. The form of these warrants is fixed by the statute. Should there be occasion, they may doubtless be issued by either of the courts in term-time, or either of the judges in vacation, in which case they would be called *bench warrants*; but they are usually issued by justices of the peace; and in compliance with the constitutional declaration before referred to, an *affidavit* must first be made, as the predicate of the warrant, that an offence has been committed, and that the deponent either knows or believes that the person named did commit it. Without such a specific affidavit the warrant cannot be issued; and the warrant itself must be equally specific in describing the person and the offence; for human liberty is too dear to be jeopardized upon uncertainties; and the same remarks apply to search warrants. In both of these cases, then, an offence has been already committed, of which oath or affirmation has been made, before the issuing of the *capias* or *warrant*. But it being far better to *prevent* the commission of an offence, if possible, than to wait until it has been committed, and then punish it, provision is made that if any person has just cause to fear, and does fear, that another will kill, wound, beat, or abuse him, or those immediately connected with him, or will burn his buildings or destroy his property; and such person will make affidavit to this effect; a warrant shall thereupon be issued for the arrest of the person complained of; and if upon investigation, the magistrate shall be of opinion that there was just cause for fear, he will order the accused to enter into a *recognizance* to appear and answer at the next term of the court, and, in the mean time, to keep the peace; and in default of such recognizance, will commit him to jail. This is what is meant by being put under *bonds for good behavior*.

§ 230. *Arrest and examination.* (a) An arrest on a criminal charge is defined to be, the apprehending or restraining of a person, in order that he may be forthcoming to answer the charge of an alleged or suspected crime. The act of privilege from arrest, before described, extends to civil arrests only, as we have seen, and not to criminal arrests; which, therefore, may be made upon all persons, and at all times and places. Crime has no asylum but in absolute concealment. Even a man's house is not his castle against criminal arrests, though it is against civil. In general, as we have just seen, the arrest is made by an *officer*, under the authority of a *capias* or *warrant*, predicated upon the affidavit of some credible person; but there is no question that arrests may be safely made without either. All persons, whether officers or not, must necessarily have the power to arrest offenders committing the offence *in their presence*; and it is their duty so

(a) See 4 Black. 292; Davis v. Russell, 5 Bingham, 340; Coles v. Dunbar, 12 Com. Law Rep. 265; Wright v. Count, 10 Com. Law Rep. 412; Lawrence v. Hedger, 3 Taunton, 14.

to do ; for when they see the act perpetrated, they are in no danger from an action for false imprisonment or malicious prosecution, which is the only hazard they could incur ; and it would be wrong to give such offenders a chance of escaping by waiting to take out a warrant. The English, and probably the American doctrine is this :—Conservators of the peace may break open doors to make such arrest ; and may command other persons, by word only, to assist them, who will be culpable if they refuse so to do : also, if they have *good reason to believe* that an offence has been committed, though not in their presence, and have strong grounds to suspect the individual, they may safely cause the arrest to be made. But a *private person* would not be safe in making the arrest in the latter case ; because he would not have the excuse of official duty. The prudent course would be to notify an officer, or go at once to a magistrate, and make the affidavit to obtain a warrant ; though if such private person were certain that an offence had been committed, and had reasonable ground for suspicion as to the offender, he might be safe in seizing him without a warrant, for the purpose of carrying him before a magistrate ; because, if the suspicion should prove false, probable cause would be a complete defence, and, even the good intention would be a shield against heavy damages. So, in regard to arrests to prevent the commission of crimes ; it is clear that any person seeing another about to commit a crime, may interfere to prevent him ; and if necessary, may detain him, until it may be reasonably presumed that he has altered his mind ; but where one thus intervenes to prevent fighting, prudence requires him to declare his purpose beforehand ; for otherwise he may be confounded with the offender, without the means of proving his innocence. Thus with regard to criminal arrests, the law is wisely framed with a view to protect both parties, those who make, and those who suffer such arrests.

The accused being thus arrested, the next thing is the *examination* before the magistrate. This must take place immediately, unless some material witness be wanting, or there be some other urgent reason for postponing it ; in which case our statute allows the accused to be placed in jail for safe keeping ; but not for a period exceeding thirty-six hours, lest the power of imprisonment without examination might be abused. In general, this examination is only a *preliminary step*, for the purpose of ascertaining whether there be reasonable cause to hold the accused to abide the inquest of a grand jury. But there are some trivial cases, under our statute, in which the proceedings before the magistrate are final. Thus, if a person be arrested on the charge of assault and battery, or an affray at fisticuffs, on the complaint of the party injured, and elect to plead guilty, the magistrate may at his option, impose a fine within one hundred dollars, or hold him

to answer in court; so if a person provoke, or attempt to provoke another to commit a breach of the peace, though the peace be not broken, the magistrate may fine him for this; and there are a few other trifling fines which he may impose. But with these exceptions, the power of the magistrate is only that of examination, without punishment; and according to the result of this examination, the accused will either be entirely discharged, or committed to jail, or held to bail. If not discharged, the witnesses are likewise put under recognizance to appear and testify in court.

§ 231. *Commitment and bail.* (a) If upon examination the evidence be such as to convince the magistrate that the accused ought not to be discharged; and if the offence charged either be not bailable, or the accused be unable to give bail; the only course is to commit him to jail to await his trial at the next term of the court, if an indictment shall be found against him. The instrument or warrant of commitment is commonly called a *mittimus*; and its form is fixed by the statute. After describing the offence, and the failure to give bail, it commands the jailer to receive and detain the accused, until he shall be discharged by due course of law. Being thus committed, the accused must remain in prison until trial, unless released in one of the ways hereafter to be described. In the mean time, he is entitled to have his situation made as comfortable as the nature of the case will admit of; and any unnecessary severity on the part of the jailer, will subject

(a) *Mittimus.* The State of ———, County of ———. To the keeper of the jail of said county. Whereas ———, late of said county, has been arrested on the oath of ———, for [describe the crime], and has been examined by me, ———, one of the justices of the peace of said county, on such charge, and required to give bail in the sum of \$———, for his appearance before the court of ——— in said county on the ———, which requisition he has failed to comply with; therefore, I command you to receive the said ——— into your custody, in the jail of said county, there to remain until he shall be discharged by due course of law.

Recognizance. The State of ———, County of ———. Be it remembered that on the ———, ——— and ——— personally appeared before me, ———, one of the justices of the peace for said county, and jointly and severally acknowledged themselves to owe to the state of ———, the sum of \$———, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to wit: the condition of this recognizance is such, that if the above bound ——— shall personally appear before the court of ——— for said county, on the ———, then and there to answer the charge of [describe the offence], and abide the judgment of the court, and not depart without leave, then this recognizance shall be void. Taken and acknowledged before me on the day and year above written. [Signature of officer].

If the recognizance be to keep the peace, add to the above condition thus:—And in the mean time shall keep the peace, and be of good behavior towards the citizens of the state generally, and especially towards ———, then, &c. The recognizance of a witness differs only in the condition, which is to appear and testify. These recognizances are returned by the justice to the court where the party is to appear; and a memorandum of them being made on the minutes, they are treated as if taken in that court.

On the subject of bail, in criminal cases, see *Dewit's Lessee v. Osburn*, 5 Ohio, 480; *State v. Wellman*, 3 Ohio, 14; *Morris v. Marcy*, 4 Ohio, 83; *State v. Dawson*, 6 Ohio, 251.

him to punishment; for which provision is made, in conformity with that humane declaration of the constitution, "that no person arrested or confined in jail, shall be treated with unnecessary rigor." Both the federal and state constitutions, as we have seen, declare that "excessive bail shall not be required." The actual amount, however, is not fixed by law, except in a few instances, but left to the discretion of the officer who takes bail; and who also decides upon the sufficiency of the sureties. Again, our constitution declares that "all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." Thus there can be but one offence in this state which is not bailable, and even that is not absolutely excluded. The federal constitution has no corresponding provision; but under the acts of Congress, all offences are bailable. Thus the accused has abundant provision made for his comfort, during the interval between the arrest and trial. The mode of taking bail, in all criminal cases, is by recognizance, the form of which is fixed by the statute, and the nature of which has been already indicated. The occasions of taking bail, I will now enumerate: 1. When the sheriff makes the arrest on a *capias* upon indictment, if the offence be below penitentiary, he is specially authorized to take bail in any sum between fifty and two hundred dollars; otherwise, the court, when the indictment is brought in, fix the amount, which is endorsed upon the *capias*, and the sheriff takes bail in that sum. He is also authorized, as we have seen, to take recognizances for appearance and for keeping the peace, in all cases where an offence has been committed within his knowledge or view. 2. The coroner, when he holds an inquest over a dead body, is authorized to recognize the witnesses; but not the accused, for he is not presumed to be yet arrested. 3. The magistrate, whether judge or justice, when he holds the examination, is authorized to recognize both the accused and the witnesses. In certain cases, also, as we have seen, he may recognize persons to keep the peace. 4. The court in passing sentence for any offence enumerated in the act for the punishment of offences, may recognize the offender to keep the peace for two years, if deemed expedient. 5. On *habeas corpus*, a proceeding which has been explained before, the judge who inquires into the cause of detention, may take bail, when he thinks the case justifies it; and this writ may issue for the relief of any prisoner committed for trial, unless it be on a capital charge. 6. By special provision, when any person has been committed for a bailable offence, either by a judge, justice, or sheriff, any single judge may admit such person to bail, and may direct the prisoner, by special warrant, to be brought before him for that purpose. This, to say the least, is a singular provision; and it is moreover rendered entirely unnecessary by that which is next to be described. 7. There is an *examining court* specially provided for the relief of prisoners

confined on a criminal accusation. It consists of the three associate judges of the county, who, at the request of any such prisoner, may be convened at any time, on three days' notice; and after examining into the facts of the case, may either discharge, recommit, or hold the prisoner to bail, as they think proper. Thus they form a tribunal to *review* the proceedings of the committing magistrate. It would thus appear that there can be no necessity for the foregoing provision conferring the power to examine and take bail on a single judge. As things now stand, a prisoner under accusation may have relief in three ways; namely, on habeas corpus, by the decision of a single judge, and by the examining court; and probably he may try them all in succession. The danger therefore is, that in cases of excitement, these conflicting jurisdictions may come into collision with each other. 8. Provision is made that the sureties may at any time surrender their principal to any judge, who will thereupon commit him to prison, or take new bail, as the case may require. And this brings us up to the proceedings in court.

§ 232. *Grand jury.* (a) We have already seen that no offender can be put to trial on a criminal charge, until a bill of indictment has been found against him by the grand jury. The language of the federal constitution is, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The language of our state constitution includes "any criminal charge." The sole function therefore of a grand jury is to pass upon indictments prepared for them by the prosecuting officer. The term "*presentment*," confers no additional authority. It simply means that they are to present accusations in the form of indictments. The *qualifications* of grand jurors are the same as of electors, which have already been described. The mode of *selection*, also, is the same as for petit jurors, which has before been described. In this state, the number is fifteen; and it has been decided that where the state law fixes the number, the federal courts in that state are governed thereby. Grand jurors are summoned by a writ of *venire facias*, which is served by the sheriff ten days before each term. If, upon impanelling them, a sufficient number be not forthcoming, the panel is filled up with *talesmen* or *bystanders*. I have observed that this course is objectionable, even for petit jurors in civil cases: but the objection is still stronger with respect to grand jurors; for their functions are too important in every respect, to justify the giving of a discretion to the sheriff to fill up vacancies with any loiterers who may happen to be about the court. But so stands the law. In this state, the right to *challenge* a grand juror seems to be confined by statute to the prosecuting attorney, and it must be for good cause

(a) See Davis' *Precedents*, 1—32; 1 Chitty's *Crim. Law*, chap. 6.

shown. But it has been elsewhere decided, that a prisoner whose case is to come before the grand jury, may also challenge for cause before the oath is administered. The principal *causes* of challenge are, the want of any of the prescribed qualifications; irregularity in the mode of selecting, drawing, or summoning; and the having deliberately formed and expressed an opinion. (a) When the panel is completed, the *oath* is administered to the *foreman*, who is appointed by the court, and all the rest are sworn to observe the same oath. The form of the oath as prescribed by our statute, is as follows:—"Saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service: the counsel of the state, your own, and your fellows', you shall keep secret, unless called on in a court of justice to make disclosures; you shall present no person through hatred, malice, or ill will, nor leave any person unrepresented, through fear, favor, or affection, or for any reward or hope thereof; but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding." The meaning of this language is too plain to need comment. The reason for requiring *secrecy* is obvious. If the testimony be not sufficient to justify the finding of an indictment, the reputation of the accused ought not to suffer by having it known that a suspicion had existed. And if sufficient, the accused ought not, by knowing what it is, to be able to meet it on the trial by perjury, or avoid its effect by making his escape. After the oath, the presiding judge delivers a *charge*, instructing the jurors in their duties; and in this state there are several acts, relating to elections, auctions, taverns, ferries, gaming, brothels, supervisors, bank-notes, and the like, which are required to be specially mentioned in this charge; but there is no authority for expatiating upon politics, as is frequently done; and one would suppose that a nice sense of judicial propriety would prevent the slightest allusion to such subjects. The grand jury now retire to discharge their duties. If they require other witnesses than those who appear voluntarily, or upon recognizance, the prosecuting officer causes them to be brought in. The witnesses are sworn by the clerk, who gives each a certificate of that fact, and only one is admitted at a time. The rule is, that no testimony ought to be received, which would be incompetent on the trial; and as this is a question of law, the grand jury may take advice of the prosecuting officer, or of the court, if they so desire. Another rule is that they are only to hear evidence against the accused. The meaning is, that they are not to resolve

(a) 1 Burr's Trial, 33, 37, 44, 425; Commonwealth v. Smith, 9 Mass. 110; Commonwealth v. Parker, 2 Pick. 568.

themselves into a traverse jury. They are not to seek evidence in exculpation, nor hear witnesses sent there by the accused for that purpose. But when witnesses are properly before them, they are to receive what tends to exculpate, as well as what tends to inculpate. As to the weight of evidence required, the rule is, that they ought not to find a bill unless the evidence be such as, if uncontradicted, would induce them on the trial to convict. The old rule, that a bill ought to be found, if guilt is rendered more probable than innocence, is not adopted in this country. But of the weight of evidence they are the exclusive judges. The prosecuting officer, though sharing in their councils, and entitled to be present in all their deliberations, is not to be consulted on this question. It is for him to prepare the indictments, and answer all questions of law, but not to advise whether an indictment ought to be found. The grand jury are sworn "diligently to inquire." This requires them fairly to investigate all offences brought properly before them or within their own knowledge. But it does not require them to prowl about for matters of accusation out of doors. They are a "grand inquest," but not an inquisition. And they are to observe the most rigorous impartiality. The attribute of mercy belongs elsewhere. If any appear to have violated the law, no matter who or what they are, high or low, rich or poor, informed or ignorant, they are to be indicted, without fear, favor, or affection. The one great aim should be to ascertain the truth, and having done so, to act upon it, regardless of consequences.

Twelve out of the fifteen must concur, in order to sustain an indictment; in which case the foreman indorses it, "*a true bill*," and signs his name by way of authentication, even though his own opinion should be the other way. The indictment is also indorsed by the prosecuting attorney; and in general these indorsements are the only authentication it requires: but in our act for the punishment of offences, in order to prevent groundless accusations, the complaining or prosecuting witness is required to indorse the indictment as security for costs; which costs he must pay if the accused be acquitted, unless the court think he had good cause to make the complaint. If twelve do not concur in finding a bill, it is said to be *ignored*, and the accused has a right to be immediately discharged; but this does not prevent a subsequent grand jury from finding a true bill for the same offence. Whenever the grand jury desire instructions from the court, they may come in and receive them; but the accused cannot move for specific instructions beforehand. Indictments when found are brought into court by the foreman, and delivered to the clerk, who docket them in the order of presentation. Not being included in our statute of *amendments*, they can only be amended in matters of form; nor even then, without the consent of the grand jury. When the grand jury have been discharged uncondition-

ally by the court, they cannot be reconvened. And I may observe that there is no warrant either in law or propriety, for an expression of their opinion upon political matters, which is now too much the custom, in imitation of the judge who may have charged them on these subjects.

§ 233. *Indictment.* (a) Both our federal and state constitutions declare that the accused shall have a "speedy public trial." And our statute provides that where the offence is capital, so that there can be no bail, the indictment shall be found at the first term after the commitment, or else the prisoner shall be discharged, if he require it; unless there be very urgent reasons for postponement. In other cases, the matter is left to the discretion of the court. As to the time within which an indictment may be found, after the commission of the offence, our limitations are these: namely, for all the offences enumerated in the act for the punishment of offences, except petit larceny, one year: for all the offences specified in the act for the punishment of immoral practices, except the neglect of a magistrate to pay over fines, the proceedings must be commenced within ten days; for assault and battery, or affray at fisticuffs, where the defendant pleads guilty before a justice, within three months: and for provoking a quarrel, within ten days. Under the laws of the United States, the limitations are these: namely, for all capital offences, except murder and forgery, three years; for all offences against the revenue laws, five years; and for all other offences, not capital, two years. It will thus be seen that for the great majority of offences in this state, there is no limitation; and the indictment may be found at any time. I will now make a few remarks upon its form and contents.

1. *Its form.* In framing an indictment the highest degree of precision and certainty is required; nothing must be left to inference or implication; the offence must be so described, that it

(a) *Form of an indictment.* I shall here give, by way of illustration, the form of an indictment for murder. I have before given the substantial part of several indictments for the higher offences, in connexion with a description of those offences, to which I now refer.

The State of ———, County of ———, Court of ———, ——— Term, in the year ———. The grand jurors of the county aforesaid, upon their oaths present, that one ———, hêretofore, to wit, on the ———, with force and arms at ———, in the county aforesaid, in and upon one ——— purposely, and of deliberate and premeditated malice, did make an assault; and did then and there discharge, and shoot off, to, against, and upon the said ———, a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol the said ——— in his right hand then and there held; and with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder aforesaid, did then and there purposely, and of deliberate and premeditated malice, strike, penetrate, and wound the said ———, in and upon the right side of the belly of him the said ———, thereby giving to him the said ——— one mortal wound of the depth of ——— inches, and of the breadth of ——— inches, of which said mortal wound, the said ——— then and there instantly died; and so the said ———, in the manner, and by the means aforesaid, did purposely, and of deliberate and premeditated malice, kill and murder the said ———; against the peace and dignity of the said state, and contrary to the form of the statute in such case made and provided.

cannot be mistaken in any essential particular; but mere clerical or grammatical errors will not vitiate it, unless they render the meaning obscure. There must be no figures or abbreviations, except in giving the *fac simile* of a writing; and if there be more averments than are necessary, the superfluous ones will merely be rejected as surplusage, and thus do no harm. An indictment properly divides itself into three parts, the *introduction*, *description*, and *conclusion*. The introduction and conclusion being matters of form, are the same in all indictments; but the description varies for each offence. The *introduction* begins with a *caption*, naming the state, county, court, and term. In making up the record, however, the caption contains, in addition, the names of the judges and of the grand jurors, and the date of the commencement of the term. (a) And it has been held that under the law of Congress, requiring the prisoner to be furnished with a copy of the indictment, such copy must contain this full caption. The indictment then proceeds, "the grand jurors of the county aforesaid, upon their oaths present, that," &c.; then follows a description of the offence; and the conclusion is, "against the peace and dignity of the state, and contrary to the form of the statute in such case made and provided." The county stated in the caption is called *the venue*. And by the law of this state it must be the county in which the offence was committed; for even when the venue is changed for trial, as will be explained hereafter, the change does not take place until the indictment has been found. The only difference between indictments in the federal and in the state courts, is, that in the former, the *district* is named instead of the county, and the United States instead of the state. It was formerly the practice to prefix to the above conclusion words like these;—"To the great damage of the person injured; to the evil example of all others in the like case offending; and to the great displeasure of Almighty God;" but these expressions are never necessary.

2. *Description of the offence.* When the offence is created by statute, as we have seen is the case with all offences punishable by this state or by the United States, the indictment must not only conclude, "contrary to the form of the statute," but must by express words, bring the offence substantially within the statutory description; (b) and the safest rule, therefore, is to follow the exact words of the statute; but the statute itself, if a public act, need not be recited. If an indictment undertake to set forth a *writing* according to its "*tenor*," the exact words and figures must be copied; for its tenor is held to be synonymous with identity; but if it only undertake to give the "*purport*," a substantial descrip-

(a) *Young v. State*, 6 Ohio, 435; *Mahan v. State*, 10 Ohio, 232; *United States v. Insurgents*, 2 Dallas, 335.

(b) See 1 Chit. C. L. 182; *United States v. Bachelder*, 2 Gallison, 15; *Williams v. State*, Wright's Rep. 42.

tion will be sufficient. (a) In describing *persons*, no *addition* is in any case necessary. In England the necessity was created by statute, and we have not adopted it. When the act must be done with a particular *intent*, in order to render it criminal, that intent must be expressly averred. It is doubtful if it be ever essential to say that the act was committed "*with force and arms*;" but when the act was in fact forcible, it is prudent to insert them. When *knowledge* constitutes a part of the offence, it must be averred; and this is usually done by the words, "*knowingly*" or "*well knowing*." There are certain technical words used in describing particular offences, which are said to be indispensable; thus in treason, "*traitorously*;" in burglary, "*burglariously*;" in larceny, "*feloniously took and carried away*;" in robbery, "*feloniously and against the will*;" in rape, "*feloniously ravished, and carnally knew*;" in riots, "*riotously*;" and in murder in the first degree, "*purposely and of deliberate and premeditated malice*." But it is never necessary to use the words, "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil;" nor the words, "of his own wicked and corrupt mind, being a person of evil disposition." Where *wounds* are mentioned, it is held that their length and depth, and the part of the body must be stated; and in murder, they must be alleged to be "*mortal*." But the value of the *weapon* need not be stated; nor the fact that the person slain "was in the peace of God and of the state." The name of the person upon whom the offence was committed, if known, must be stated; but if not known, he may be described as "a certain person to the jurors unknown." It is usual to state the residence of the defendant, but as the place of his residence cannot affect his guilt, there seems to be no good reason for this. A *time* and *place*, however, must be stated for every material fact, but when these have been once stated, they may afterwards be referred to by the words "then and there;" and unless the time enters into the nature of the offence, or the place is out of the county, a different time and place from those alleged may be proved. In the averments of *number* and *quantity*, as well as time and place, it is usual to employ a "*videlicet*" or "*to wit*," under the impression that less strict proof will then be required; but it is doubtful if this makes any difference. If *several offenders* be concerned in the same offence, they may all be joined in one indictment, whether principals or accessories; or they may be indicted separately. If joined in the same indictment, it is a matter of discretion with the court to grant them separate trials or not. But if the offence be capital, this is seldom refused, on account of the difficulty, in a joint trial, of giving each his full number of challenges. *Several offences* may also be joined in

(a) Hess v. State, 5 Ohio, 1; Pickens v. State, 6 Ohio, 274.

one indictment, in different counts, although the punishment be different; but the court, in their discretion, may require the prosecuting attorney to elect on which he will proceed, and give up the rest; and the better practice is to have separate indictments for each offence. Neither the state nor federal laws contain any provisions varying the common law on the subject of indictments, except in reference to perjury, and subornation of perjury. In these cases it was formerly necessary to make the indictment exceedingly voluminous, by setting forth the authority of the person administering the oath, together with all the circumstances of the case. But there are now statutory provisions expressly dispensing with this.

§ 234. *Arraignment.* (a) The indictment having been thus found, the next step is to *arraign* the prisoner. Being placed at the bar, he is called upon by name to arise. The indictment is then read to him by the prosecuting attorney, or the clerk. Sometimes the substance is merely stated, but the whole indictment should be read. The prisoner is then asked, whether he is *guilty* or *not guilty*. Before answering he is entitled to have the advice of *counsel*. Formerly this was not the case in England; but both the federal and state constitutions expressly assert this right by declaring that "in all criminal prosecutions, the accused hath a right to be heard by himself and counsel;" and by our statute, the court are required to assign such counsel, not exceeding two, as the prisoner shall desire, if he be unable to employ counsel; which counsel may have access to him in prison, at all reasonable hours. The prisoner may then answer to the arraignment either by himself or counsel. If the indictment be for a capital offence, this is the time to make his election to be tried in the supreme court; in which case, the indictment, plea, and election are recorded in the court of common pleas, and certified under seal to the supreme court. (b) If the accused do not so elect, or the offence is not capital, he must plead to the indictment. If he ask time, a reasonable time will be allowed him for preparation; and for this purpose he is entitled to a *copy of the indictment*, as a constitutional right, the declaration being, that he may "demand the nature and cause of the accusation against him, and have a copy thereof." Our statute provides that in capital and penitentiary offences, he shall have this copy at least twelve hours before the trial. (c) The act of Congress provides that in treason, he shall have it three entire days before the trial, and in all other capital cases two. As to all other cases, both laws are silent. If, on being

(a) See 3 Black. chap. 25; 1 Chitty's Crim. Law, 337; 2 Swift's Dig. 386.

(b) State v. Turner, Wright's Rep. 20.

(c) The construction given to this provision is, that if the accused demand a copy of the indictment, he cannot be forced to trial until twelve hours after it is furnished. But if he consents to go to trial without making such demand, he cannot afterwards object that the copy was not furnished. Smith v. State, 8 Ohio, 294.

arraigned, the prisoner make no answer, but *stand mute*, then by our statute a jury is to be impanelled to try whether he stands mute obstinately, or by the act of God. If by the act of God, he is to be remanded to prison until he recovers the use of speech; but if obstinately, the plea of not guilty is to be entered, and the cause goes on to trial; and the same is done when he refuses to plead. This is a singular provision, to say the least. Suppose the prisoner be actually dumb; is he therefore to remain in prison for ever? Or is it seriously believed that he may be miraculously struck dumb by the act of God, and afterwards recover his speech? In England the course is directly the opposite of this; (a) but either course would seem to be entirely unnecessary; and so it is in fact considered by Congress; who have provided that in all cases of standing mute, the prisoner is treated as if he had pleaded not guilty; and this is the common sense of the matter. The law presumes every man innocent until proved guilty; and as the prisoner, by standing mute, does not admit his guilt, the question is properly put to the proof, by entering for him the plea of not guilty, and proceeding to trial. I have just said that every man is presumed to be innocent, until proved to be guilty. The meaning is, that such is the *legal presumption*. No doubt the *actual presumption* is, that a man who has been first examined before a magistrate, and afterwards indicted by a grand jury, must be guilty; that is, his guilt is thus rendered more probable than his innocence. But still the law humanely presumes him to be innocent, so far as relates to the *burthen of proof*. It is not for the prisoner to prove his innocence, but for the state to prove his guilt; and he need say nothing in defence, until a *prima facie* case is made out against him. This is all the expression means; and in this connexion I will further observe, that as the state has the burthen of proof, so it has the opening and close of the argument, as in other cases. I believe that in France and in Scotland the advantage of closing the argument is given to the prisoner; and would not humanity justify a similar course here? There could certainly be no great danger in giving the prisoner the last word.

§ 235. *Plea and issue.* (b) If, upon being arraigned, the pri-

(a) 4 Black. Com. 324; 1 Western Law Journal, 162, 415.

(b) See 4 Black. chap. 26; 1 Chitty's C. L. chap. 9; Davis' Prec. 276; 2 Swift's Dig. 399. The forms of presenting the defence differ very little from the corresponding forms in civil cases, except that the prisoner always pleads in person, as will be seen by the following examples.

1. *Plea to the jurisdiction.* And the said ———, in his proper person comes into court, and having heard the said indictment read, says that this court ought not to take cognizance of the offence in the said indictment charged, because, protesting that he is not guilty of the same, nevertheless he says that [here state the facts showing the want of jurisdiction]; and this the said ——— is ready to verify. Wherefore he prays judgment if this court will take cognizance of the indictment aforesaid, and that he may be permitted to go hence without day.

The *replication* to this plea, which is put in by the prosecuting attorney, states that

soner, instead of standing mute, answer that he is *guilty*, it will only remain for the court to pass sentence; except in the case of murder, where by special provision, the court are required to hear testimony, to determine the degree of murder. But if he deny his guilt, it must be in one of the modes pointed out by the common law; for neither the federal nor state laws provide any other way. These modes are as follows; *first*, a plea to the jurisdiction; *secondly*, a demurrer; *thirdly*, a plea in abatement; *fourthly*, a special plea in bar; or *fifthly*, the general issue of not guilty; for we have no such pleas as *sanctuary* or *benefit of clergy*; neither of which absurdities has ever been allowed in this country.

1. *A Plea to the jurisdiction.* This is the proper course when the indictment is found before a court having no jurisdiction of the offence. We have already considered the distribution of criminal jurisdiction, among the federal and state courts, and nothing further need be said here.

2. *A demurrer.* This is the proper course, when, admitting the truth of the facts alleged, they do not make out the offence intended. Thus the demurrer here has the same office as in civil

the court ought not to be precluded from taking cognizance of the indictment and gives the reasons; and then concludes with a prayer that the prisoner may be held to answer to the indictment.

2. *Demurrer.* And the said ——— in his proper person comes into court; and having heard the said indictment read, says that the same, and the matters and things therein contained, in manner and form as the same are therein stated, are not sufficient in law, and that he is not bound by the law of the land to answer the same: wherefore, for want of a sufficient indictment, he prays judgment that he be permitted to go hence without day.

The *joinder* asserts the sufficiency of the indictment, and prays that the prisoner may be convicted.

3. *Plea of a misnomer.* And now ———, who in this indictment is called by the name of ———, in his proper person comes into court, and having heard this indictment read, says that his name is ———, by which name he has always hitherto been known and called, without this, that he now is, or hitherto has been called or known by the name of ———, as in the said indictment is supposed; and this he is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed.

The *replication* states that he is, and long has been known and called, as well by the name mentioned in the indictment, as by that mentioned in the plea; and concludes to the country. It has been decided that a plea of misnomer is the only way of taking advantage of it. After verdict the objection is waived. *Smith v. State*, 8 Ohio, 294.

4. *Plea of former acquittal.* And the said ———, in his proper person comes into court, and having heard the said indictment read, says that the state ought not further to prosecute the same against him, because he says that heretofore, to wit, at the court of ——— holden at ——— on the ———, [here set forth the record of the former verdict, judgment and acquittal]; as by the record thereof now remaining in said court more fully appears; and the said ——— avers that he is the same person, and the offence in the present indictment charged is the same offence as in the said record and acquittal are contained; and this he is ready to verify; wherefore he prays judgment, and that he may be permitted to go hence without day.

The *replication* is *nul tiel record*; unless the fact of identity of person or offence be denied, in which case it is a traverse concluding to the country. It has been held that this plea must set forth the judgment as well as the verdict, because there is no acquittal until judgment. *Hurley v. State*, 6 Ohio, 399.

cases. If the demurrer should be sustained, it would be the acquittal of the prisoner; for, as we have already seen, there can be no amendment, after the discharge of the grand jury. If the demurrer should be overruled, there can be little doubt that the prisoner would still be allowed to make an issue of fact, by putting in a plea. However, as there has been some uncertainty on this point, and as the same question may be raised on the general issue, or in arrest of judgment, or in writ of error, it is generally best not to demur.

3. *A plea in abatement.* This is chiefly confined to a *misnomer* of the prisoner. It must be accompanied with an affidavit stating the true name. Of course delay is the only advantage gained; and this plea is therefore seldom pleaded.

4. *A special plea in bar.* This is the proper course, when, admitting the truth and sufficiency of the indictment, the defendant has a reason to offer, why he ought not to be tried. The only pleas in bar which can be pleaded in this country are, a former acquittal; a former conviction; or a pardon. There can be no such plea as a *former attain*, because attainder is expressly prohibited, as we have seen, by the federal and state constitutions. A *former acquittal*, called *autrefois acquit*, and a *former conviction*, called *autrefois convict*, are both founded upon the fundamental principle, asserted in the federal and state constitutions, as we have already seen, (*a*) that no man "shall be twice put in jeopardy for the same offence." This declaration is general, and includes every offence. If therefore the prisoner has been formerly tried, and either acquitted or convicted, of the same identical offence, it is a complete defence against the present indictment; but the jeopardy does not exist, until there has been a judgment rendered. If the jury were discharged, on the former trial, without rendering a verdict; or if judgment were arrested; or a new trial granted; there has been no jeopardy in the legal sense of the term; and neither of these pleas can be set up to a subsequent indictment, or to the same indictment at a subsequent term, founded on the same cause. A *pardon* can only be pleaded in bar, where it is competent to grant a pardon *before conviction*, since after conviction there can be no occasion to plead it. This may be done in England. Perhaps it may be done by the constitution of the United States, for the language is not precise; but in the constitution of this state the power to pardon is expressly limited to cases *after conviction*. Consequently there is no opportunity here for a plea of pardon. If either of these special pleas be decided against the defendant, it does not conclude him; for in favor of life or liberty, he is still permitted to plead the general issue, and require his guilt to be proved.

(a) See 3 Story's Com. 659; People v. Goodman, 18 Johns. 187; U. S. v. Perez, 9 Wheat. 579.

5. *The general issue.* In all criminal cases the general issue is simply *not guilty*; and under this issue the defendant may set up every possible defence. It is seldom therefore, that any other plea is put in. Upon entering this plea, which is by a mere memorandum made by the clerk on the back of the indictment, much of the formality practised in the English courts is dispensed with. There is seldom, if ever, a *joinder* or *similiter* entered at the time, and it is doubtful if the want of it could be objected to, even in the final record.

§ 236. *Trial.* (a) In all criminal prosecutions, the right "to have a speedy public trial, by an impartial jury of the county or district, in which the offence shall have been committed," is expressly secured to the prisoner both by the federal and state constitutions; and thus the ancient and absurd methods of trial by *ordeal*, by *corsned*, and by *battle*, as described by Blackstone, are for ever abrogated.

Place of trial. By the state law, the trial must be had in the *county* where the offence was committed, unless it be shown to the court by affidavits that a fair trial cannot there be had; in which case, the *venue may be changed* to an adjoining county. Whether this can be done at the instance of the prisoner only, or on motion of the prosecuting attorney also, is not specified, and may admit of much doubt. Where poison has been given, or a mortal blow inflicted in one county, and the death takes place in another, there might be some doubt in which the offence could be said to be committed; and to remove this doubt, our statute provides that the trial shall be in the former. It may also be made a question, when goods are stolen in one county, and carried into another, in which the trial shall be? Probably in the former, though I am not aware that the point has been decided with respect to counties. With respect to *states*, (b) there have been contradictory decisions. In Massachusetts it has been held that a thief who stole goods in another state, and brought them there, might be tried and punished there, as for a continued larceny; but in New York the contrary has been held, and this would seem to be the better opinion. By the federal constitution, the trial must be in the *state or district* where the offence was committed; and if not committed within any district, then where Congress shall appoint; and Congress has provided that it shall be in the district where the offender is apprehended, or into which he is first brought; also, that in capital cases, the trial shall be had in the county where the offence was committed, unless it would be attended with great inconvenience; in which case, at least twelve of the petit jurors shall be from that county; but there is no provision in any case for a change of venue.

(a) See 4 Black. chap. 27; 1 Chitty's Crim. Law, chap. 12; 2 Swift's Dig. 403.

(b) See Commonwealth v. Andrews, 2 Mass. 14; People v. Gardner, 2 Johns. 477.

Time of trial. We have already seen that the trial must be at the same term in which the indictment is found, unless there be good reason for postponement; and by our statute the prisoner, in capital cases, is entitled to a *copy of the panel of the jury* twelve hours before the trial. Nothing is said as to other offences, or as to a list of the witnesses. By the act of Congress, in case of treason, the prisoner is entitled to a list of the jury and witnesses against him, three days before the trial; and to a list of the jury, in all other capital cases, two days before the trial.

Petit jury. The trial or traverse jury is so called, to distinguish it from the grand jury. These jurors must have the same qualifications, and are selected, drawn, and summoned in the same way as grand jurors. In all but capital cases, twelve only are summoned. In capital cases our statute requires thirty-six. The act of Congress is silent respecting the number, and it is left to the discretion of the court. If the requisite number be not at hand, the panel may be filled as in other cases, with *talesmen* from the bystanders. In all criminal trials, our statute allows the state and the prisoner each to *challenge* (a) two jurors *peremptorily*, that is, without assigning cause; and in capital cases, the prisoner may challenge twenty-three peremptorily. The act of Congress allows no peremptory challenge by government; but in treason, the prisoner may challenge thirty-five peremptorily; in the other capital offences mentioned in the act of 1790, he may challenge twenty; and in all capital offences created since that act, thirty-five, as at common law; but in offences not capital, there is no peremptory challenge. *Challenges for cause* must of course be without limit as to number. These challenges may be *to the whole array*, if not summoned according to law; otherwise, to the individuals as they are called. The causes of challenge are, first, a want of any of the prescribed qualifications; and secondly, some presumed or actual bias, founded on relationship or enmity to the prisoner, or the having formed and expressed an opinion. The panel must be full, before the challenge begins; and no challenge can be made to the array, after challenging individuals. All the objections to a juror must be stated at once. If a juror be challenged by one side without success, he may still be challenged by the other; and if first challenged for cause without success, he may still be challenged peremptorily. By the act of Congress, if the prisoner challenge peremptorily more than his number, he is treated as standing mute, and the trial proceeds; but we have no such provision. When a *panel* of twelve has thus been completed, the *oath* or *affirmation* is administered, "well and truly to try, and true deliverance make between the state of Ohio and the prisoner

(a) Where several offenders are tried together, each has his full number of challenges, but the state only has two. *Mahan v. State*, 10 Ohio, 232. And see on the subject of challenge, *Hooker v. State*, 4 Ohio, 348; *Bixbe v. State*, 6 Ohio, 86.

at the bar, and a true verdict to give, according to the evidence." The oath says nothing about the *law*, yet there is an opinion very prevalent in this state, that in criminal cases jurors are judges both of *law and fact*. This absurd idea is perhaps founded upon an expression in the constitution on the subject of libels, "that in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." But this, if it means any thing, which may well be doubted, does not by any means sustain the inference just mentioned; on the contrary, it indicates that the jury are to take the law in all cases from the court; for the very sufficient reason that they do not of themselves know what the law is. Again the language of our statute has been thought to favor the same opinion. But this merely asserts the right of the jury in all cases, to render a *general* or *special* verdict, at their pleasure. And although a general verdict of guilty or not guilty, does decide both law and fact, yet if this verdict be against the law as laid down by the court, it will as a matter of course be set aside on application; though we have no means, as in England, of punishing jurors for so doing. In no sense, therefore, are jurors judges of the law in criminal cases, more than in civil.

Witnesses. (a) Both the federal and state constitutions, as we have seen, declare that the prisoner "shall have compulsory process for obtaining witnesses in his favor;" or, in other words, that he shall have the same means of compelling the attendance of his witnesses, as can be had on the other side, except that he cannot have them *recognized*; and the statutory provisions carry out this principle. Subpœnas are first issued, and if the witnesses refuse to obey them, they may be brought in by attachment; but the general rules of evidence are nearly the same as in civil cases, and have been already stated. There are, however, some peculiar provisions respecting evidence in criminal cases, which require to be noticed. In the first place no man can be forced "to give evidence against himself." There can be no such thing as *torture* to extort confessions. This is prohibited by both constitutions. Again, every prisoner has a right to "meet his witness face to face." This excludes the evidence of *depositions*, except with the consent of the prisoner. In treason, as we have seen, there must be "at least two witnesses to the same overt act, or a confession made in open court." To prevent witnesses from being tampered with, it is made penal, as we have seen, to bribe them, and for them to accept a bribe. That they may not be prevented from attending court, they are privileged from arrest for civil matters, while going, attending, and returning; and that they may not refuse to testify, when before the court, such refusal

(a) See, on the general subject of evidence in criminal cases, M'Nally's *Criminal Evidence*, and Roscoe's *Criminal Evidence*.

is made penal. The subpoena in criminal cases runs throughout the state; and that witnesses may be assured of receiving their fees, they are paid by the county. By the acts of Congress, subpoenas in criminal cases run throughout the United States; and the witnesses are held to be privileged, without express provision.

The verdict. (a) When the testimony has been closed, and the cause argued by the counsel on each side, it is given to the jury under instructions from the court as to matters of law. The jury then retire for deliberation, under the charge of an officer, who is sworn to see that no person has access to them, or communication with them, unless by permission of the court. They cannot separate until they agree upon a verdict, or are discharged by the court. Formerly they could not be discharged until they came to an agreement one way or the other; and if it became necessary for the court to remove, the jury were carried after them in a cart; nor could they in the mean time take any nourishment of any description; in order, it would seem, that starvation might produce unanimity; but both these absurdities are now done away. The jury may take nourishment under permission from the court; and whenever the court are satisfied that there is no prospect of their agreeing upon a verdict, they may be discharged, and the cause tried over again, as if no trial had taken place. But the principle is still retained, that the jury cannot separate, unless by agreement of counsel, after the trial commences, until their verdict be rendered, or they be discharged. If therefore the court adjourn during the trial, from day to day, the jury, unless by consent, must remain together under the charge of the officer. Should one of the jurors be taken ill, or die, his place cannot be supplied; but the rest must be discharged, and a new jury called; and it is on this principle, that a juror is sometimes withdrawn by agreement, in order to effect a continuance of the cause. We have seen that the verdict may be general or special, at the option of the jury. It cannot be sealed up and sent into court, as in civil cases; but must be delivered personally in open court, all the jurors being present; and in capital cases, at least, the verdict must be delivered in the presence of the prisoner. (b) If it be manifestly an improper verdict, the court may at once send the jury back to reconsider it; but when it has been once recorded, it must stand unaltered, and a juror cannot himself contradict it. But a request by the prisoner that the jury be *polled* is never refused. This consists in calling upon each juror to say whether the verdict reported by

(a) See 4 Black. chap. 27; 1 Chitty's Crim. Law, 636; Hurley v. State, 6 Ohio, 399.

(b) But it has been held that where the accused, who has given bail, absconds during the trial, the verdict may be rendered in his absence. Fight v. State, 7 Ohio, part 1, 180.

the foreman is his verdict, and can only be done at the time the verdict is brought in. If any juror then dissents, it is no verdict. Should it be an acquittal, the prisoner is entitled to an immediate discharge; for proceedings are at an end. The government cannot move for a new trial, or an arrest of judgment, or have a writ of error. But if the verdict be against the prisoner, he may take either or all of these steps, as his counsel may advise: the two first before judgment, the last after judgment. He cannot appeal; for our law allows no appeal in criminal cases. Perhaps it would have been well to allow an appeal in capital cases; but instead of this our law gives the prisoner his option in these cases, upon being arraigned, to choose the court in which he will be tried. After the verdict, sentence will follow, unless prevented in some one of the ways now to be described.

New trial. (a) Both the federal and state courts have power to grant new trials, for reasons for which new trials have usually been granted in courts of law; and the power extends to all offences; but not more than two new trials can be allowed in the same cause. The motion must be made and disposed of at the same term with the trial; and it cannot be made after the hearing of a motion in arrest of judgment. The grounds for a new trial, are the same as in civil cases; and only need to be recapitulated.

1. Misbehavior of the jury. 2. Improper instructions by the court. 3. The verdict being contrary to law or evidence. 4. The improper admission or rejection of evidence. 5. The discovery of new and material evidence, since the trial. These are all matters of fact, which do not appear of record, and which cannot therefore be taken advantage of in any other way, unless made part of the record by a *bill of exceptions*, as before explained. The allowance of a new trial vacates the proceedings on the first trial; and the cause is continued, as if no jury had been impanelled. A *venire facias de novo* may also be resorted to, which is the same as a new trial; except that it is allowed only on a special verdict, and for the purpose of curing some defect in such verdict.

Arrest of judgment. (b) The motion in arrest of judgment must be founded on some substantial error apparent on the record, which error may have occurred at any stage of the proceedings; for as no defects can be amended, so none are cured by the verdict. Whenever a demurrer would have been sustained, judgment will be arrested. The motion ought to be made before sentence is pronounced; and if notice be given of it, sentence will be stayed; but as the court have control over their judgments during the term, the motion may be heard even after sentence. The effect of arresting the judgment, is to vacate all the proceedings, and set the prisoner at large; but this is no bar to a new indictment for

(a) See 1 Chitty's Crim. Law, 654.

(b) See 1 Chitty's Crim. Law, 661.

the same cause, as we have seen before; for the jeopardy has not existed until the rendition of the judgment.

§ 237. *Judgment.* (a) As we allow no compromise between the prosecutor and offender after verdict, and no benefit of clergy, it follows, that unless a new trial be granted, or the judgment be arrested, it must be rendered during the term. This judgment is the sentence of the law upon the verdict, and the terms judgment and sentence, are synonymous. The form of the judgment of course varies to suit the punishment annexed to each offence; as we have seen, the court usually exercises a discretion as to the amount of punishment, with certain fixed limits. When the offence is below capital, the judgment must include costs against the defendant; and in this state, as we have seen, for certain minor offences, if the defendant be acquitted, there must be a judgment for costs against the prosecuting witness who has indorsed the indictment; unless the court should think he had good cause for instituting the prosecution. But if the defendant be convicted, the judgment may require him to give security for good behavior. If the sentence be death, it can only be by hanging; and in case of murder, the federal courts may add that the body be given up for dissection. When the sentence has been pronounced, it must be carried into execution, unless prevented by a *writ of error, pardon, reprieve or commutation*, which are next to be considered.

1. *Writ of error.* (b) In this state no writ of error was allowed in criminal cases until 1831. But now it may be allowed in all

(a) See 1 Chitty's Crim. Law, chap. 16.

(b) This writ is the same in form as that used in civil cases, of which an example has been given. *The record* is as follows:—At a court of ———, for the county of ———, and state of ———, begun and holden at ———, by and before [name the judges], the grand jurors for the said county, to wit, [name the jurors], returned to the said court an indictment against ———, in the words and figures following, to wit: [copy the indictment and indorsements thereon]; and afterwards, to wit, on the ———, by order of the prosecuting attorney aforesaid, the following writ of *capias ad respondendum* was issued out of the clerk's office of the court aforesaid, to wit: [copy the writ and indorsements]; and afterwards, to wit, on the ———, at the term aforesaid, the said writ was returned to the court aforesaid by the said sheriff, indorsed as follows, to wit: [copy the return]; and the said sheriff also returned with the said writ the following recognizance of bail, to wit: [copy the recognizance]; and afterwards, to wit, on the ———, at the term aforesaid, the said ——— in proper person comes into court; and being arraigned upon the said indictment and having heard the same read, says; [copy the plea, replication, &c. making up the issue]; and afterwards, to wit, on the ———, at the term aforesaid, came as well the said prosecuting attorney, as the said ——— together with ——— and ——— his counsel, and thereupon came a jury, to wit, [give their names], who being impanelled and sworn the truth to speak upon the issue joined between the state aforesaid and ——— aforesaid, upon their oaths did say, [copy the verdict]; and thereupon the said ——— moved the court to grant him a new trial, and assigned the following reasons, to wit: [copy the reasons]; which motion, after argument heard thereon, the court overruled; and thereupon it was considered by the court that [copy the judgment].

On the subject of a writ of error in criminal cases, see *Baldwin v. State*, 6 Ohio, 15; *Kazer's Case*, 5 Ohio, 544.

criminal cases, upon application on behalf of the defendant. In capital cases the application must be made to two judges of the supreme court; in other cases to one judge. The error must be a substantial one, appearing on the record itself, or made part of it by a bill of exceptions. The course of proceeding is nearly the same as in civil cases, before explained. In capital and penitentiary offences, the writ is either made returnable forthwith to the supreme court, wherever it may be sitting, or to the next court in bank; and in the mean time an order is made for the suspension of the sentence. In other cases, the writ is made returnable to the next term of the court in the proper county; and a recognition to prosecute it to effect, is required before suspending the sentence. On hearing the writ of error, if the judgment be reversed, the court may either order a new trial, or an absolute discharge, according to the nature of the case. If the prisoner be already in the penitentiary, it is made the duty of the keeper to transport and deliver him to the sheriff of the county. If the judgment below be affirmed, the only hope of the convict is to obtain a pardon.

2. *Pardon.* (a) By our constitution the governor has power to grant reprieves and pardons after conviction in all cases except impeachment. The president has a similar power by the federal constitution; but it is not specified whether before or after conviction. The propriety of this disposition of the pardoning power, has been already considered. The effect of a pardon in this state, is to restore a convict to all his civil capacities. The acts of Congress say nothing on this subject. Under this power to pardon, that of *commutation* of punishment is sometimes exercised, with the assent of the convict; for the greater includes the less.

§ 238. *Execution.* (b) If the effect of the judgment be not prevented in one of these ways, it must be carried into execution. If the judgment be death, the sheriff, or in his absence, the coroner must be the executioner; for the language of the statute is such that a deputy sheriff cannot act in this case. Under the laws of the United States, the marshal is the executioner. If the judgment be imprisonment in the penitentiary, the sheriff, with such assistance as may be necessary, must transport the convict, within thirty days, to the penitentiary, and deliver him, together with a copy of the sentence and bill of costs, to the warden; who thereupon pays the costs; and then deals with the convict according to the directions of the law governing the penitentiary. If the judgment be imprisonment in jail, the prisoner is forthwith remanded; and the jailor, under a penalty for disobedience, must

(a) See *State v. Gardiner*, Wright's Rep. 404-6; 4 Black. chap. 32; 1 Chit. C. L. chap. 20.

(b) 4 Black. chap. 32; 1 Chitty's Crim. Law, chap. 20

see the sentence strictly performed. Finally, if the judgment be a fine, the convict must either pay it at once, or be committed until payment; or, if not committed, execution may issue as in civil cases.

From the view now presented of criminal proceedings, it will be obvious that the most jealous precautions have been taken to prevent the power of punishment from being abused. No important matter has been left even to legislative discretion; but from the arrest to the execution, the rights of the accused are carefully guarded by constitutional declarations. First, an oath must be made against him, before he can be arrested; then, he must be examined before a magistrate before he can be committed; then he may give bail, and the bail cannot be excessive; then, between commitment and trial, he may have his case reheard on habeas corpus, or before a single judge, or before the examining court; then, twelve impartial men must concur in finding an indictment against him; then, he may have counsel and witnesses, and every other means of making his defence; then, he may apply for a new trial, or an arrest of judgment, or for a writ of error, or pardon, after judgment; and, finally, his punishment, if it cannot be avoided, can be neither cruel nor unusual. So far, therefore, as the offender is concerned, the security against being improperly punished, is all that can be asked for. And, on the other hand, the public are sufficiently provided for, in the certainty that the punishment prescribed will be inflicted. The simplicity of all the proceedings is such, that the prosecuting attorney is inexcusable if he fail to procure a conviction from not complying with the requisite forms. In this respect, criminal proceedings compare very advantageously with civil; and this very fact serves to prove, that there is nothing in the nature of the case to prevent civil proceedings from being simplified in the manner heretofore proposed.

PART VII.
INTERNATIONAL LAW.

LECTURE XL.

PUBLIC INTERNATIONAL LAW.

§ 239. *Preliminary considerations.* We have now completed such a survey as our plan would permit, of our internal or domestic law, comprehending whatever is ordained by our own government, for the regulation of persons and property within our own jurisdiction. But the operation of law is not confined to these limits. We constitute one of the great family of nations, our relations with each of which, as much require to be regulated by law, as do the relations between individuals composing one nation; and this law no one nation can prescribe or administer for itself alone. Accordingly there yet remains another division of law which we denominate *international*. This has usually been made the first part of a course of legal study. Instead of adopting the synthetic method, as I have, and commencing with the simplest elements of municipal organization, writers have generally preferred to begin where this process would end, and to pursue the inverse order of analysis. Accordingly they have commenced with the aggregate of human beings inhabiting the whole earth, and made a primary division of them into those great communities, which we call *nations*. They have then proceeded to treat of these nations, as a kind of complex persons, possessing a collective unity though composed of associated millions; and have expounded their rights and obligations in advance as constituting the first and highest branch of law. In this way they have introduced us to international law, before they have informed us how nations are constituted. In other words, they have exhibited the external relations of nations, before explaining their internal organization. But for reasons which appear to me sufficient, I have preferred the opposite course. Certainly the most simple and natural method is to begin at home, and gradually widen the circle of inquiry. Besides, there is an important

part of international law which cannot well be understood, until domestic law has been first explored.

I shall consider the subject under two distinct subdivisions, devoting a lecture to each. Of course I can only exhibit the most general outlines. In the present lecture, I shall present a concise epitome of the *public law of nations*, strictly so called, comprehending that system of rules by which nations are governed in their intercourse with each other, as well in peace as in war. In the next lecture I shall consider the *private law of nations*, having for its object to ascertain in what cases of conflict between the domestic and foreign law, respecting private rights, one nation is bound to recognize and enforce the laws of another.

You will readily perceive that if these inquiries are not as practical as those which have hitherto occupied us, they more than make up in dignity what they lack in every-day utility. They contemplate mankind from a loftier eminence, and embrace in their scope a far wider horizon, than any of the subjects before discussed. The law we have been considering rests upon direct and positive sanctions. The same power which ordains it, enforces obedience. But international law relies upon moral sanctions alone. The sublime spirit which animates the whole system, is submission to the right. Nations stand, not upon legal compulsion, but upon their own honor and integrity. Their grand maxim is, *fides est servanda*—good faith is to be preserved. By this title they hold their domains, and on this basis they frame their compacts. Acknowledging no allegiance to any human power, they fear not the sentence of any human tribunal. Their profession is to demand nothing that is not right, and submit to nothing that is wrong; and when their rights are violated, there being no power to grant them redress, they redress themselves. These and similar considerations give to international law a grandeur and dignity, which belongs to hardly any other subject of investigation.

But here the question arises, how and by whom is this law ordained? There being no great international legislature, no general Congress or common government of nations, whence originates the law which controls them? Dispensing with much unprofitable discussion, I briefly answer that nations, like individuals, are bound to observe the immutable and eternal principles of natural justice; and these accordingly form the professed basis of the international code. Hence the law of nature and the law of nations are sometimes spoken of as synonymous. But in point of fact, as nations might not in all cases concur in the application of these abstract principles to their own concerns; and as, in case of difference of opinion, there is no common umpire to adjust such controversy, recourse is necessarily had to the binding authority of *usage*; and the fundamental doctrine is, that nations are bound by what custom has settled. The law of nations,

therefore, belongs to the department of *unwritten law*; and may be described as a collection of usages and precedents, dating as far back as the earliest histories, and gradually accumulating with the progress of ages, until the aggregate, by general, though tacit adoption among civilized nations, has become a comprehensive body of established law, whose sanctions are, the public opinion of mankind on the one hand, and the countless evils of war on the other. The original source of information, therefore, is history, in which the doings of nations are recorded. But the student is relieved from traversing the wide field of history, by the splendid labors of distinguished writers, such as Grotius, Puffendorf, Bynkershoek, Burlamaqui, Vattel, and many others, who have collected and arranged the original elements, and thrown around them the light of their own luminous reasonings. (a)

Of the history of international law I have not room to speak. Suffice it to say that whatever is most valuable is of comparatively modern date. There could be little sense of obligation among nations, so long as it was held a maxim that nations are natural enemies, and that war is their congenial element. But in recent times a mighty change has taken place in public sentiment upon this subject. Nations are now regarded as natural friends, and peace their proper condition. The dictates of humanity have been listened to by governments; and they hold that war is only to be resorted to when all other means of adjusting controversies fail, and then is to be conducted with all possible clemency. In fact philanthropy can derive from history no subject of more gratifying contemplation, than the improved state of international intercourse.

§ 240. *First principles.* Our subsequent inquiries will be greatly facilitated by attending, at the outset, to those leading ideas or first principles, which lie at the foundation of the law of nations. And first, what constitutes a nation? By a nation in the sense in which I am now using the term, I understand a society of people so organized as to govern themselves independently of foreign powers. The elements of such organization have been before considered. The particular form of government is not here material. It may be a democracy, aristocracy, monarchy, or despotism, or a combination of these; it may be either consolidated or federative; and it may, or may not have colonies, or other dependencies. These are considerations which do not enter into the definition. The simple criterion is independent self-government, in some form or other. What that form shall be, is a question for the people of each nation to determine for themselves. Other nations look only to the fact of independent self-government. Hence it follows that if a community be in

(a) The student is advised to read the first nine lectures of Kent, and a late American treatise, by Wheaton. See also 4 Black. 66.

any way dependent upon, or subordinate to another community, it is not of itself a nation, but only a part of a nation on which it depends. Thus the American colonies, before the revolution, were only parts of the British nation. And, in like manner, the states of this Union are not nations, because they have parted with many of the attributes of independent self-government; but only parts of that one and entire nation, known and recognized by other nations as the United States, and comprehending the people of all the states and territories, bound together under one supreme federal government. Accordingly we are relieved from the necessity of inquiring into the various and complex forms under which nations may exist, internally considered; since their external relations are not thereby affected. In fact the simplest method of arriving at the general nature of these relations, is to consider each nation as a kind of complex human being, and then to compare nations to individuals existing in a state of nature. In this way we readily arrive at those fundamental principles upon which the system of international law is constructed.

The first of these principles is a *perfect equality of rights*. We have seen that individuals, before entering into the social compact, are absolutely equal in their rights, however unequal in other respects. In like manner, and for the same reason, nations, however unequal in numbers or resources, and however diverse in their forms of government, are altogether equal in their rights. This equality among nations might be deduced from the consideration, that no one nation can have derived originally from nature any rights, which all other nations have not also derived from the same common source. But it results directly from the idea of sovereignty, the very essence of which is that it acknowledges no earthly superior. Rights and obligations are reciprocal between nations as between individuals. What one nation has a right to demand, all other nations are bound to concede. If, therefore, one nation could claim rights which another could not, the latter would be subordinate to the former; or in other words, would cease to be sovereign. In short, sovereigns can only be conceived of as equals. This original equality may, indeed, be forcibly disturbed by superior might, or voluntarily modified by compact; but still it must form the basis of all reasoning upon national rights. Attempts have been sometimes made to classify nations with respect to dignity, and thus give to some precedence over others. But this relates only to ceremonial observances, and does not in the least affect the doctrine of a perfect equality of rights.

Another principle nearly allied to the preceding, is that of *absolute independence*. This, as we have seen, enters into the very definition of a nation. The doctrine is that every nation has a perfect right to do what it pleases, provided it does not interfere

with the same right in all other nations. Subject to this single qualification, every nation has supreme and exclusive control within its own limits, and other nations have no right whatever to interfere with its internal concerns. Thus national independence is the result of equality and sovereignty combined; and the rightful power of each nation is qualified and measured by corresponding rights in all other nations.

But equality and independence, though recognized in theory, would be practically of no avail, without the *right of self-defence*. This therefore is the paramount right of nations, as of individuals; serving as the shield and protection of all other rights. We must be careful, however, to distinguish between the right of self-defence, and the right of retaliation. Self-defence, by the very import of the terms, is purely preventive in its operation. It authorizes any measures necessary to prevent the violation of any rights; but it goes no further. Whereas retaliation avenges wrongs actually committed, with a view to prevent their repetition. On this ground, and this alone, can retaliation be justified between nations, though not allowed between individuals. Nations are compelled to take vengeance into their own hands, because there is no criminal tribunal to punish for them; and aggressors must be taught that they cannot do wrong with impunity.

Next follows the *right of redress*. This, like retaliation, presupposes a wrong actually committed; but its aim is indemnity, and not punishment. And here again nations are under the necessity of taking the matter into their own hands. Of the mode as well as measure of redress, they are obliged to be the exclusive judges, there being no superior power to determine for them.

Finally, on these three fundamental rights, self-defence, retaliation, and redress, depends the justifiableness of war. Without some one or all of these grounds, war is in itself the greatest possible wrong. But when they exist, it is permitted as a necessary evil. Accordingly in the law of nations, the rights and usages of war occupy a place as important as those of peace, since without the former, the latter would have no effectual sanction. I proceed therefore to consider, first, the rights of nations in time of peace, and next, those which result from war. For the sake of convenience, I shall endeavor to arrange them under the several heads of jurisdictional, proprietary, diplomatic, commercial, belligerent, and neutral rights.

§ 241. *Jurisdictional rights*. We have just seen that each nation has the fundamental right of regulating its internal concerns according to its own pleasure, this being the very essence of sovereignty. Efforts have, indeed, been made among some of the leading powers of Europe to qualify this right to some extent, by asserting what they call the *right of intervention*. They base this right of intervention upon the principle of self-defence, and

claim to interfere with the internal transactions of other nations, whenever such interference appears to be necessary for their own security. To this end the most formidable alliances have been formed, and the most destructive wars carried on. Nor can it be doubted that, to the extent here claimed, the right of intervention exists; because self-defence is the first and highest of all rights. And if nations would confine their interference to extreme cases, manifestly endangering their own security, the right of intervention might safely be admitted, as a qualification of the right of sovereignty. But the serious danger is, that under this pretext, the stronger will make aggressions upon the weaker, and that self-defence will thus be made to authorize uncalled for intermeddling. At any rate, subject to this rare exception, the right of supreme internal jurisdiction is absolute and unqualified. And this includes, of course, the right of revolution, which, as we have already seen, must exist as an ultimate right among all people. Of the emergency which may call for a change of government, the subjects of each nation are the exclusive judges. But it is important to observe that such a change does not affect existing rights and obligations with respect to other nations. These rights and obligations survive in full force, in favor of and against the succeeding government. This is true even when a nation has been divided into distinct governments; in which case, unless apportioned by special agreement, pre-existing rights and obligations attach to all the parts in common, so far as other nations are concerned. But here the question arises, how far may foreign aid be given to either of the contending factions in a civil contest? It is very clear that one nation may not invite or induce the subjects of another to rebel against the constituted authorities. But when a state of revolution or insurrection actually exists, it is held that foreign interposition may lawfully take place. Writers usually annex to the granting of aid to the insurgent party, the condition that the revolution must be for a justifiable cause; and no doubt this consideration would furnish the strongest ground for appeal to foreign sympathy. But in practice, nations usually view the question as one of mere expediency. The end of a successful revolution being to establish a new government, the right to aid the struggling party, in anticipation of this event, is merely a consequence of the right to form alliances. And on the same ground rests the right to acknowledge the independence of the new government. In either case, the question is one of expediency only. If the revolution be in progress, or the new government established, other nations may grant or refuse assistance or recognition, as they deem proper, without inquiring into the justifiableness of the revolution. Acting upon this principle, France did not hesitate to lend her aid to our early struggles, and we did not hesitate to recognize the independence of the South American States, and of Texas.

With these qualifications of the general right of jurisdiction, it may be laid down as a broad proposition, that each government has complete and absolute control over all persons and things within its territorial limits, exclusive of every other government. How far the accommodating principle of national comity has been admitted to modify the strict exercise of this imperative power, will be seen in the next lecture. It is sufficient here to say, that with the single exception of immunities conceded to diplomatic agents, to be mentioned hereafter, this absolute control over all persons and things within its dominions, is universally acknowledged to appertain to every government. As to persons, the jurisdiction embraces foreigners as much as natives; and as to things, it makes no difference whose property they are. Every nation has a right, either to prohibit altogether the entrance of foreigners or their property into its dominions, or to prescribe the conditions upon which they shall be admitted; and one of these conditions, always implied if not expressed, is a full and entire submission to the laws, while they remain. Nor does this jurisdiction terminate with the territorial limits of each nation. It follows the persons and property of its subjects over the ocean, on which, as common ground, every government may regulate and protect its own citizens and their effects. In short it follows them until they come within the jurisdiction of some other government; and is resumed again, the moment they are free from such foreign jurisdiction. It hardly needs to be added, that on the same broad principle of power, each nation may prohibit the persons or property once within its jurisdiction, from being removed out of it, or prescribe the conditions of such removal. With respect to property, all nations freely exercise this right. But with respect to persons, it is seldom exercised, except upon citizens. In fact, the right of admission and detention, as well of persons as things, has been so far modified by the commercial spirit of modern times, that the ancient doctrines above announced, exist only in theory. And even the right of regulating foreign persons and things, while within our own limits, is now seldom exerted in its original rigor. The convenience of national intercourse, ever increasing with the progress of civilization, has almost revolutionized this part of international law.

§ 242. *Proprietary rights.* Every nation has a perfect right of property, to the exclusion of all other nations, in every thing within its territorial limits, including not only the public property of the nation, but also the private property of individuals. With respect to public property, it is the right of ownership strictly so called, of which our public lands furnish an example. With respect to private property, it is called the right of *eminent domain*, and includes the right of regulating, taxing, appropriating to public use, taking by escheat, and the like. We have seen, that according to the ancient feudal theory, the absolute ownership of

all real property, was vested in the lord paramount or supreme governor, of whom it was held on certain conditions of tenure. This right, whether of absolute ownership or eminent domain, is equally exclusive with respect to other nations; and it not only embraces those possessions which a nation may now have, but also such new possessions as may be afterwards acquired. Such acquisition may be made in three ways; namely, by *discovery* of vacant territory, which we have seen to be the source of European title to the American continent; and by *purchase* or *conquest* of territory not vacant. Thus we have seen that the United States acquired Louisiana and Florida by purchase from France and Spain, and the rest of their dominions by conquest from Great Britain. It would seem, however, according to strict ethics, that purchase is the only rightful source of title to occupied territory; and accordingly we profess to extinguish the Indian title to our territory by purchase only, and never by conquest. The truth is, that the right of conquest being only the right of the stronger, can never comport with natural justice, as against the conquered. But in the law of nations, this is held to be a question between victors and vanquished only, with which other nations have no concern; and therefore with respect to them, conquest is regarded as a valid source of title. *Prescription* is sometimes mentioned as another source of title; but it is only the presumption of right arising from long possession, and is not so much a source of title as an evidence of it. Among civilized nations at this day, there is little occasion to resort to this kind of evidence, because the limits of nations are usually ascertained by treaty. As a general rule, there is no limit to the right of acquiring new possessions in either of the ways before mentioned. The only qualification grows out of the right of self-defence in other nations. If the enlargement of its possessions by one nation, would injuriously affect the rights, or endanger the existence of another, the latter may lawfully interpose to prevent such enlargement. But this pretext for interposition is always a doubtful and dangerous one. It presupposes that a nation will cease to be just, in proportion as it becomes able to practise injustice. It is therefore, only to be resorted to in those extreme cases, where there is a moral certainty that new acquisitions will be made the means of injuring other nations. Vague fears respecting a change in the balance of power, can never justify such interposition.

What has now been said relates to property lying wholly within the territorial limits of a nation. It would therefore embrace lakes and navigable rivers thus situated. But when a lake or river lies between two nations, instead of being the exclusive property of either, each nation is owner to the middle of the stream or channel, subject to a common use for fishing and navigation. This, at least, is the general rule of public law, though there are said to be cases in which prescription has given to one

of the bordering proprietors an exclusive right to the whole. But suppose a navigable river to flow through more nations than one. In this case, may one of the nations prohibit the other from using that part of the river lying within the dominions of the former? This question arose in this country, when the lower part of the Mississippi was under the control of Spain; and it was then claimed to be our right, under the law of nations, to use that part of the river for navigation, and consequently its banks for mooring our boats, subject only to such conditions as Spain might reasonably impose, for her own security or fiscal accommodation, not amounting to an absolute or virtual prohibition. Questions of this sort, however, are usually adjusted by treaty between all the nations interested in the river.

With respect to the ocean, the general rule is, that it is the common property of all nations, for the purposes of navigation and fishing; and no part of it can ever become the exclusive property of any one nation. It is held, however, that each nation bordering on the ocean, may exercise exclusive dominion to the distance of a cannon shot from its own shore, as well for the sake of its own security, as because, to this extent, it may command the neighboring sea by means of its fortifications. And as the distance of a cannon shot would be a vague designation, the modern usage is to substitute a marine league, as the limit of such exclusive control. The rest of the ocean therefore is the common highway of all nations; though, as we have seen, each nation there exercises exclusive jurisdiction over its own citizens and their property. Thus far then, notwithstanding the ancient controversy respecting free navigation, the law of nations is now clear and definite. But with respect to those branches of the sea which come under the name of bays, gulfs, straits, friths, estuaries, arms of the sea, or narrow seas, there is more difficulty. According to the foregoing rule, the criterion would be the distance across from one cape or headland to the other; and if this were less than two leagues, a nation owning both the capes or headlands, would have exclusive dominion over the included waters; if otherwise, they would be common like the rest of the ocean. Claims have, indeed, been set up to exclusive dominion in some cases where the distance across is much greater; sometimes on the ground of national security, and sometimes, of prescription; but in these claims there has been no such general acquiescence, as to establish an exception to the limit of a marine league before mentioned.

§ 243. *Diplomatic rights.* (a) The term diplomacy is used to designate the political intercourse carried on between nations, through their recognized agents. Of the ceremony and etiquette

(a) In addition to the works on the law of nations, see *Diplomacy of the United States*, a work in two volumes, comprising an interesting history of our foreign relations.

which belong to this intercourse, my plan will not permit me to speak. Every nation has a right to send diplomatic agents to every other nation ; and the usage is to reciprocate, by sending to each nation one of the same rank as is received from that nation. On extraordinary occasions such agent is denominated an *ambassador* or *envoy*, who is charged with the execution of some specific trust. But the ordinary intercourse of nations is conducted by resident agents, called *ministers* or *charges d'affaires*, according to their rank. The mode of designating such agents depends upon the constitution of each nation. In this country, as we have before seen, they are appointed by the president, with the assent of the senate. Every diplomatic agent carries a letter of credence from his government, stating the general object of his mission, and requesting that full faith and credit may be given to his acts. If the object of the mission be special, the requisite powers may be contained either in the letters of credence or in a separate letter. In time of peace, a public minister requires no other protection on his way, than a passport from his own government ; but during war, he requires, in addition, a passport from the government to which he is sent. If it be necessary to travel through intermediate nations, his public character is respected by them, though not to the extent of absolute inviolability. On arriving at the post of destination, his first duty is to present his credentials, and be formally received in his diplomatic capacity. We have seen that the receiving of foreign ministers is one of the functions devolved upon our president ; but this is no where a peremptory duty. Every government exercises its discretion upon the question of receiving or not ; and when the nation sending, is in a state of civil war, this question is often one of exceeding delicacy ; because the reception or rejection is almost sure to give umbrage to one or the other of the contending factions.

During his official residence, a public minister is as completely exempt from the local jurisdiction, both civil and criminal, as if he were not within the territory. This absolute immunity is secured to him, not only because he is the representative of sovereignty, but in order that he may discharge the high duties of his mission without fear. And that he may be as independent of bias from favor, as from fear, our constitution forbids an American minister to receive even a present from a foreign government. Nor is the immunity, thus held sacred among all nations, confined to the person of the minister. It also embraces his family, suite, servants, house, and furniture ; but in order to secure it to his servants, the usage of nations and our act of Congress require the minister to furnish an official list of them for that purpose. When speaking of offences against the law of nations, we have seen that a violation of the immunity here spoken of, is one of the principal. And a similar immunity is

secured to messengers sent with despatches to or from foreign legations, providing they carry passports attesting their official character; for the violation of such passports is another offence against the law of nations. It hardly need be added, that while public ministers and their families are thus exempted from foreign jurisdiction, they remain as amenable to the jurisdiction of their own government, as if they had continued at home.

After the first formal reception of a minister, all diplomatic intercourse, saving that of mere ceremony, is conducted through the officer having charge of foreign affairs. Here this officer is the secretary of state, who transmits the instructions of this government to our ministers abroad, and negotiates with the foreign ministers resident here. It is to be observed that the instructions here spoken of, are for the private guidance of the minister; and the government to which he is sent, has no right to demand an exhibition of them. When negotiations upon any subject have been concluded, the result usually takes the form of a treaty; but however ample the powers of the negotiators may be, treaties are not usually regarded as consummated, until they have been ratified by the respective governments. To remove all doubt on a question so important, a provision to this effect is usually inserted in the treaty itself; but even if this were omitted, a treaty with this government could not be claimed to be binding until such ratification, because all nations may be presumed to know that our constitution requires such ratification by the senate, before a treaty can be recognized by us, as the supreme law of the land. After ratification thus made, should legislation be necessary to carry the treaty into effect, we have seen that the national faith is considered as pledged to pass the requisite laws.

A diplomatic mission is usually terminated by a letter of recall. If the minister be recalled because the object of the mission has been accomplished, or for any other reason not affecting the friendly relations of the two governments, the minister presents his letter of recall, and takes a ceremonious leave. In case of misconduct in a minister, the government to which he is sent usually demands his recall, which is of course complied with. But on the other hand, if a minister be so treated by the government where he is stationed, as, in his opinion, to justify the step, he may assume the responsibility of demanding his passport, and terminate the mission without a recall. In any event, however, be the cause or form of terminating the mission what it may, the minister retains all the privileges of his public character, until his return to his own country.

In past times the term diplomacy has had a meaning almost sinister annexed to it, being associated in the mind with every form of cunning, intrigue, stratagem, and overreaching. But the history of our diplomacy bears no such reproach. Thus far the

subjects of negotiation between this government and other nations, have been chiefly those of commerce and boundary, requiring the exercise of no diplomatic arts, but simply intelligence, firmness, and a sense of justice. It has been our wise and settled policy to keep aloof from those complicated political alliances which have rendered European diplomacy so intricate and embarrassing. And it may be observed generally, that the spirit of diplomatic intercourse has been improving. The frequent mediation of friendly powers, when the parties in controversy have been unable to adjust their differences, is one of the most gratifying features in the history of the times. Sanguine philanthropists have even been encouraged to hope, that, at no distant day, the civilized nations of the earth may be able to agree upon a permanent tribunal to settle all disputes. This may prove to be a visionary dream; but the very fact that it is cherished at all, is a high compliment to the diplomacy of the age.

§ 244. *Commercial rights.* It follows from what has before been said, that every nation has a right to decline all commercial intercourse with other nations, in the same manner as an individual may decline all society with his fellow creatures; but the one would be deemed as blind to its best interests as the other. Nature herself, by assigning different products to different climes, has ordained that nations should interchange them with each other; and accordingly, except in time of war, no civilized nation adopts the selfish and barbarian policy of consuming only its own products. We have already seen that commerce with foreign nations is one of the great national objects provided for in our constitution; and that a very large proportion of the acts of Congress are commercial regulations. But whence the necessity of so much local regulation! If commerce be a matter of such universal interest, why is it not governed by the universal law? I answer that, to a great extent, this is the case. There are no rules of law so universal in their operation among all nations, as those which form the body of commercial law. But hitherto the doctrines of free trade, however inviting in their theory, have never been adopted in practice. Could they meet the assent of all nations, perhaps a happier condition of the human race would be the consequence. But so long as any one nation chooses to impose restrictions upon commerce, self defence will prompt other nations to adopt countervailing regulations; and the result is, that hitherto all nations have exercised the undoubted right of placing their commerce with other nations, upon such terms as they deem most conducive to their own interests. Accordingly, in the absence of free trade, the first step towards establishing commercial relations between nations, is to have them ascertained by treaty; and the grand principle which runs through all our commercial treaties, is that of entire reciprocity. In other words, we grant to each nation the same privileges, and

impose upon each the same limitations, which that nation grants to, or imposes upon us. And when the outlines of commercial intercourse have thus been defined by treaty, the numberless details are supplied from the vast body of commercial law before referred to.

Much of the next lecture will be occupied with matters growing out of commerce between nations; and in this connection, I shall only advert to certain officers recognized by the law of nations in all commercial affairs. I have already mentioned *notaries public*, and it is sufficient here to say, that full faith and credit are every where given to their acts connected with commerce, from the simple verification of their official seals. But the most important officers connected with foreign commerce are *consuls*, who are strictly commercial, and not diplomatic agents. Every nation appoints them to reside in foreign seaports, and watch over the commercial interests of its citizens who traffic there. We have already seen that our consuls are appointed by the president and senate. Before a consul can act in his official capacity, he must present his credentials to the government under which he is to reside, and be formally recognized. In some instances consuls have been invested with judicial power to decide controversies between their own countrymen; but this can only be done by treaty, and is not usual. Nor is it necessary; for a foreign tribunal would act impartially in such cases; or if not, the dispute could be adjourned until their return home. The principal duties of our consuls have been prescribed by Congress, in the acts of 1792 and 1803. In the absence of the master, owner, or consignee, they take charge of the effects of stranded vessels. They receive protests in relation to all commercial matters where protests are required; and our courts give full faith and credit to their certificates and seals. They provide for our destitute seamen within their consulates, and send them home, if necessary, at the public expense. If our citizens die there, leaving no legal representatives, they administer upon their estates, unless prohibited by the local law. In general they are admitted to prosecute and defend suits for their countrymen, without any special authority for that purpose. But being merely commercial agents, they have none of the immunities attached to public ministers. They are subject to the jurisdiction of the government where they are stationed, to the same extent as private persons travelling under a safe conduct or passport. If guilty of misconduct, their recognition as consuls is liable to be withdrawn; and they may either be punished where they are, or sent home for punishment.

§ 245. *Belligerent rights.* I have thus far considered the rights of nations at peace. Let us now turn to those which result from war. Here we have one class of rights for those nations actually engaged in war, and thence called *belligerent*; and

another class of rights for those which take no part in the war, and thence called *neutral*. I shall consider these two classes in the order above named. I have already said that war can only be justified on one of the three grounds of self-defence, retaliation, or redress; all of which ultimately resolve themselves into the one grand principle of self-defence. But theorize as we may, each nation must determine for itself, under the sanction of the public opinion of the world, what reasons are sufficient for embarking in war. Waiving, therefore, this preliminary question, let us attend to the rules by which war is to be conducted, and the effects which it produces upon pre-existing rights.

We have before seen that, in this country, Congress has the sole power of declaring war, and making all the provisions required for prosecuting it; while the president and senate are empowered to negotiate the terms of peace. This makes it unnecessary here to enquire what amounts to a declaration of war, or whether a formal declaration must precede the commencement of hostilities; for here war exists the moment that Congress has so declared, and not before. And the theory is, that when two nations are at war, all the individuals of these two nations are personally at war, each with the other; because government speaks the voice and expresses the sentiments of the whole community. How different is the fact, I need not say; but the laws of war are framed upon this theory. Each citizen, therefore, is presumed to espouse personally the cause of his own government, right or wrong, and becomes a traitor by adhering to the other side. Hence all pre-existing contracts between citizens of the two nations are suspended, because neither can sue the other during war; and all contracts made during war are absolutely void, with the single exception of contracts of ransom, to be mentioned hereafter. It has also been held, as a matter of strict right, that each nation may confiscate the debts due from its citizens to enemies, and may seize not only the property but the persons of enemies, wherever they may be found, except within neutral jurisdiction. This savage right, however, is seldom asserted in its full rigor, in modern warfare; and with respect to persons and property within each other's jurisdiction, it is not unusual to provide beforehand, by treaty, that each nation shall give to the citizens of the other a reasonable time for removal. Even without such a stipulation, our courts have decided that no seizure or confiscation can here take place, without a special provision of Congress to that effect. This of itself is an important security to alien enemies in case of a war with us; and the cause of humanity is also every where promoted by the granting of licenses, passports, and safe-conducts, for the protection of alien enemies and their property; the violation of which is an offence against the law of nations. But with these exceptions and modifications, the theory of individual hostility and

responsibility is fully carried out in the practice of war. All commercial, as well as diplomatic intercourse is broken off; and even partnerships existing between belligerents, are held to be dissolved. Nor is this all; for property may sometimes be liable to seizure as hostile, when the owner himself is not an alien enemy. Thus the produce of hostile soil is liable to capture, whoever may be the owner; and the same is true of property found in a hostile country, belonging to a person having his domicile, or a commercial establishment there; though not a subject of that government. The test of domicile, in such cases, is residence in the hostile country, with the intention of remaining; or, in case of temporary absence, the intention of returning. Again, according to the rule asserted by some of the European nations in 1756, but not universally acquiesced in, if a neutral be engaged in the colonial or coasting trade of the enemy, which trade was not open to foreigners in time of peace, such employment takes away his neutral protection, and subjects his property to capture. Lastly, if property be found under the flag and protection of the enemy, that circumstance alone gives it a hostile character. And it may be observed generally, that where property has a hostile character at the commencement of a voyage, it cannot avoid that character by transfer during the voyage. On the whole then it appears, that from the moment war breaks out, as a matter of stern right, both the persons and property of the enemy are subject to seizure wherever they can be found, except within neutral jurisdiction; and that property may be seized, when it does not actually belong to an enemy, if it have either of the foregoing characteristics of hostile property. These harsh doctrines spring legitimately from the ancient spirit of war, which was to do the enemy as much harm as possible, by every means whatsoever. But the modern practice of nations, under a more humane spirit, has rendered such doctrines rather mementos of the past, than guides for the present. This will be evident by a reference to some of the prevailing usages of war.

One of the acts which frequently precedes the breaking out of hostilities is, the imposition of an *embargo*. This we have seen to be one of the incidental powers of Congress. An embargo may have one of two objects; either to prevent the ships of the nation declaring it, from leaving the port and becoming a prey to the enemy; or to detain the ships of the enemy in pledge, until subsequent events determine whether they shall be condemned or not, as hostile property. The result, in such case, will greatly depend upon the course pursued by the enemy; for in war the rule is, not to do as you would be done by, but to do as you are done by. In other words, retaliation is deemed admissible and often practised.

Another measure which may either precede or accompany open war, is the authorizing of *reprisals*. We have seen that Congress

is expressly empowered to grant letters of marque and reprisal ; and the law of nations authorizes such a step, whenever the subjects of one nation have been injured by those of another, and a demand of redress has not been complied with. Reprisals may extend to the persons, as well as property of the offending nation, though usually to the latter ; and they are for the most part confined to the high seas. The persons seized are sometimes held by way of hostage, and the property by way of pledge, until the conduct of the offender shall determine the disposition to be made of them.

I have said that the ancient spirit of war was to do the enemy as much harm as possible. But the modern rule is to use no more violence than is necessary to accomplish the purposes of the war. Hence, even in ravaging the territory of the enemy, it is usual not to molest any persons not actually engaged in hostility, unless they be found violating some of the usages of war. To take captive or put to death the members of the municipal government, women and children, or any other persons pursuing the ordinary avocations of civil life, would, therefore, be regarded as a barbarous outrage upon the usages of modern warfare. And a similar change has taken place in the treatment of prisoners of war. Once it was deemed right to put them to death. Now this fate is reserved for spies only. Nor are prisoners now reduced to slavery as in ancient times, when slavery or death was the only alternative of capture. But on the contrary, often during the war, and always at the termination of it, the prisoners are either exchanged or ransomed. In fact, it is a part of the discretionary power, as it must be the grateful duty, of the chief officers in command, to alleviate as far as practicable the evils of war, by negotiating cartels for the exchange of prisoners, truces for the suspension of hostilities, and capitulations for the surrender of posts.

With respect to hostile property, a similar, though not quite so extensive amelioration has taken place. Property on land, whether public or private, is now seldom seized or destroyed, unless for the sustenance of the invading army, or by way of retaliation, or when such seizure is absolutely necessary to accomplish the object of the war. But with respect to hostile property at sea the ancient spirit still prevails in full rigor ; and such property is always liable to capture and confiscation. The reason alleged for this difference is, that this is the only effectual method of humbling the maritime power of the enemy, or prosecuting a maritime war to the intended issue. Yet even this right of making captures at sea, is subject to several regulations tending to moderate the evils naturally resulting from licensed plunder. Private individuals, who rob the enemy without authority from government, are not indeed liable to be treated as pirates ; but the main inducement to commit such depredation is taken away, by the doctrine that

the captures so made belong, not to the captors themselves, but to their government, being technically called *rights of admiralty*. To avoid the effect of this doctrine, and transfer the ownership from the government to the captors, a commission for making prizes is necessary from the government; and this is the case with respect to those private armed vessels called *privateers*, which are commissioned to cruise against the floating commerce of the enemy. In order to stimulate individual zeal against the enemy, by invoking avarice to the aid of patriotism, the owners of privateers are permitted to retain for themselves the prizes they make; but at the same time they are required to give security to government, that they will respect neutral rights, and conform to the usages of war. Under all possible safeguards, however, the practice of privateering is subject to manifold abuses. It is in fact only one step removed from lawless depredation. Efforts have more than once been made to abolish it by treaty; and there is good reason to hope that public sentiment will ere long be too powerful against it, to be resisted. We have already seen that in this country privateering is confined to our own wars; it being highly penal for any person within our jurisdiction, and for our own citizens elsewhere, to be concerned in fitting out privateers to cruise against powers with whom we are at peace. It therefore wants but one step more to rid ourselves altogether of this reproach to modern civilization.

When property has been lawfully captured from the enemy, the title strictly speaking is changed the moment the capture is completed. It remains, however, subject to recapture or rescue by the former owner or his countrymen. And in the latter case, the right of *postliminy* intervenes, and the property recaptured, instead of being a new prize belonging to the recapturer, is restored to its original owner, that fellow countrymen may not thrive upon the misfortunes of each other. But this right of postliminy is subject to many qualifications. In case of captures on land it does not exist, if the property has been in possession of the captor for twenty-four hours, or has been transferred in good faith to a neutral; and in case of maritime captures, it does not exist after a regular sentence of condemnation by a prize court. In fact, by the modern usage of nations there can be no security of title to maritime captures, until such sentence has been pronounced; this being considered the only sure way of furnishing satisfactory proof that the capture was lawful, and not an infringement of neutral rights. By the law of nations the prize court must be constituted by the government of the captor, and must sit within the dominions of that government or of its ally, and not within the dominions of a neutral power. But it is now held that the condemnation may take place while the prize itself is in a neutral port, and out of the jurisdiction of the court. Further than this, a neutral port cannot be made the theatre of hostile operations.

In this country the district court, by virtue of its admiralty jurisdiction, discharges the functions of a prize court. Such courts professedly administer the law of nations, and their decision is conclusive upon the question of property. If neutral rights be thereby violated, the nation becomes responsible for the injury, but the property passes pursuant to the sentence. A purchaser, therefore, of condemned property, is secure in his title against every thing but a recapture by the enemy; and a neutral purchaser is secure even against that. The recaptor also is secure against the claim of postliminy unless there be some internal regulation of his government to the contrary. But it sometimes happens that a prize cannot be sent into port; in which case, the captor may either destroy it, or permit the former owner to ransom it. Contracts of ransom are highly favored by the law of nations, and the ransom is held equivalent to a safe conduct of the ransomer. But the ransom bill is as liable to recapture in the hands of the captor, as the prize itself would have been. With respect to real property, the title by conquest is not conclusive, until the treaty of peace. In the event of reconquest, it returns again to the original proprietor by the right of postliminy, notwithstanding intermediate transfers. But if ultimately ceded to the conqueror, the transfers are valid. Finally with respect to all captures, if the treaty of peace makes no provision concerning them, the right of postliminy is at an end, and the title remains confirmed in the possessor.

§ 246. *Neutral rights.* A neutral nation, as the term imports, is one that takes neither side in an impending war. Our natural position with respect to other nations has been eminently favorable to the observance of a strict neutrality; and this has accordingly been our steadfast policy from the commencement of our national existence. Thus far we have entirely avoided those entangling alliances, so common among the nations of Europe, which would have required us to embark in war, at the will of others, in order to redeem a pledge. To us, therefore, attached to neutrality both from principle and expediency, the subject of neutral rights is especially interesting.

The grand principle of neutrality is neither to aid nor hinder either of the belligerents, but to stand entirely indifferent between them; and in return for this strict impartiality, not to be in any way molested by them. With some slight exceptions, which will be adverted to, this principle forms the basis of all neutral rights and obligations.

In the first place, neutral territory is not to be made the theatre of hostile operations. This operates as well for the protection of belligerents as neutrals. Both the persons and property of each of the belligerents, on neutral ground, are exempt from liability to seizure by the other; and if a neutral permit such seizure, he is bound to make restitution. But it is no departure from

neutrality to permit belligerent forces to pass through neutral territory, provided no acts of hostility be allowed; though a neutral is under no obligation to grant this privilege. When prizes are brought within neutral jurisdiction, which were made in violation of neutral rights, the neutral government may reverse the sentence of condemnation and restore the property, for the purpose of vindicating its neutrality; and still more may it reclaim the property of its own citizens illegally captured. We have already seen that prize courts may not sit within neutral jurisdiction, though the prizes themselves may be brought there to await the adjudication of the proper tribunal. Public ships of war may also be received into a neutral port, provided there be no hostile object, and the same favor be granted to both belligerents; but they may not be built, armed, or equipped there, for the purposes of war. And to give the highest possible sanction to these rules within our jurisdiction, we have seen that Congress has made it highly penal for any person within our jurisdiction, to set on foot any military expedition, or enlist troops or seamen, or fit out ships, or augment the force of foreign ships in violation of the obligations of neutrality.

In the next place, neutrality is to be observed and respected upon the ocean. On the one hand, the neutral is not to be disturbed in the prosecution of his ordinary commerce as well with the belligerents as with other nations; and on the other hand, he is not to favor either of the belligerents in his hostile operations at the expense of the other. It is a general rule that neutral property is exempt from seizure, even when found in hostile ships; and also that neutral ships carrying hostile property are themselves exempt from seizure, though the hostile property in them is not. Efforts have been made to establish the maxim that free ships make free goods; or, in other words, to render the neutral flag a protection even to hostile property. This was the object of the celebrated armed neutrality. But there has been no general acquiescence in this maxim; and the rule still is, that hostile property in neutral ships, out of neutral jurisdiction, is liable to capture. To these general rights of neutrals there are, however, two exceptions, one relating to contraband goods, and the other to blockaded ports.

Without attempting a detailed description of the articles which are held to be *contraband of war*, it is sufficient here to say that they include not only implements and munitions of war, but all other articles which are directly auxiliary to hostile operations. Provisions are not generally contraband, but may become so, from the special circumstances under which they are supplied. Sometimes treaties stipulate what shall, and what shall not be contraband as between the contracting parties. But the question of contraband or not, being once settled, the rule is universal that neutrals may not furnish contraband articles to either of the belligerents, under the penalty of confiscation, not only of the contra-

band articles themselves, but also of the whole cargo of which they form a part; and formerly the ship itself suffered the same fate.

The rights of *blockade and siege* are among those well settled belligerent rights, which neutrals are bound to respect. Each nation at war has a right to blockade the ports, or besiege the fortifications of the other. But it is not sufficient simply to declare a port under blockade or a place under siege. There must be an actual force on the spot to constitute a blockade or siege; for otherwise a mere proclamation might shut up the commerce of the world. But when a blockade or siege actually exists, neutrals cannot knowingly maintain any commerce whatever with the places thus invested, under the penalty of confiscation of the ship destined to, or coming from such places; and also of the cargo, unless it can be shown that its owners had no concern in the matter. This rule is vindicated upon the ground that blockades and sieges are legitimate measures of war, which would be rendered of no avail, if neutrals were permitted to relieve against them.

There is still a third exception to neutral intercourse, analogous to the preceding, which is that neutrals may not be concerned in bearing *hostile despatches*, under the penalty of confiscation of the vehicle, and of the cargo also, unless it can be shown that its owners had no knowledge of the offence.

Such being the rights and obligations of neutrals, it is incumbent on them to see that their ships are furnished with the documents requisite to sustain their neutral character. Mere custom house documents, as we have seen, are not sufficient for this purpose, not being known to the law of nations. The only evidence of national character is a passport or sea-letter duly authenticated. But still the question arises, how are belligerents to know what ships are in fact neutral? The answer is, that they have the right of search, for the purpose of ascertaining. However inconvenient and vexatious the exercise of this right may be to neutrals, they are bound to submit to it: and resistance may involve a confiscation of the ship and cargo. No other rule could prevent the neutral flag from being made a pretext for violating the rights of belligerents.

LECTURE XLI.

PRIVATE INTERNATIONAL LAW.

§ 247. *Preliminary considerations.* (a) This branch of international law is usually discussed under the title of *conflict of laws*, its object being to determine in what cases of conflict between the laws of different nations, the domestic law shall give place to the foreign law. But as questions of this kind chiefly concern the private relations of individuals, depending upon the law of different nations, and not the political relations existing between those nations, I prefer the title of private international law, in contradistinction to that of public international law, which has just been considered. We have already seen that each nation of right possesses an exclusive sovereignty and jurisdiction within its own territory, but none whatever beyond it, except upon the ocean. Hence it follows that the laws of one nation can have no intrinsic authority in any other nation. Whenever, therefore, any nation, within its own limits, gives effect to the laws of another nation, it is to be regarded as a matter of concession. The disposition to make such concession is denominated *comity*; and hence we say that comity is the foundation of private international law. But comity, which is but another name for the spirit of accommodation, if left to the control of an arbitrary or capricious will, would be but a dubious and unstable guide. To render it a safe criterion of rights, it must be exercised according to established rules; and hence the original suggestions of comity, founded on a sense of mutual convenience, have been clothed with the sanctions of positive law. Accordingly it is no longer optional with the tribunals of one nation to recognize, or not, the laws of another, as the disposition of the moment may incline them; but the question is to be settled, as in all other cases, either by legislative enactments or by judicial precedents. In one or the other of these ways each nation prescribes for itself the limits of its comity; and hence we may naturally look for more diversity in this branch of law, than in the public law of nations. The prevailing practice has formerly been to apply the rule of reciprocity; that is, to give effect to the law of other nations only when they, under similar circumstances, give effect to our law. But this rule is gradually giving way to the higher considerations of abstract justice and the universal welfare; and just in proportion as these exalted motives shall operate upon legislators and judges throughout the world,

(a) On the subject of this lecture I need make no other reference than to Story's *Commentaries on the Conflict of Laws*, a lucid and comprehensive treatise which scarcely leaves any thing to be desired in this department of jurisprudence.

will this branch of law approximate to general uniformity. In the brief outline which I propose to exhibit, I shall confine myself to the doctrines held in this country, and to a very general view even of them. I shall arrange my remarks under four general heads; namely, *persons, property, crimes, and procedure*.

§ 248. *As to the law of persons.* In the view I am now taking, the law which determines the capacity, state, and condition of persons, is called *personal law*, as to which there is no universal rule admitted by all nations. But the rule prevailing in this country is, that as to acts done, rights acquired, and obligations incurred, in the place of domicil, the law of such domicil will govern every where; but otherwise, the law of the place of the transaction will govern. This general rule will determine the capacities and incapacities incident to infancy, coverture, idiocy and lunacy, and all other personal abilities and disabilities, founded in the law of nature, and not in derogation of common right. But foreign nations will not regard disqualifications created by penal laws, or laws authorizing slavery, unless there be some express compact on the subject, like that existing between the states of this Union. Moreover, each nation may make an exception to the above rule with respect to its own subjects; for as to them there can be no question of comity, and therefore they will not be permitted to evade their own law, by resorting to countries where a different law prevails. Such then being the general rule, I shall first consider what constitutes domicil, and then apply the rule to the various classes of persons heretofore mentioned.

1. *Domicil.* In the common acceptance, domicil means the place where a person resides; but in a legal sense, domicil means the place where a person has his fixed and permanent home or establishment. Two things must concur to constitute domicil, namely, actual residence and the intention of remaining; or, in case of temporary absence, the intention of returning; and as there must be this concurrence of fact and intention, the question of domicil is often a difficult one. The most general rules on the subject are these. The place where one is born is his domicil, if it was the domicil of his parents; if not, their domicil is his during minority, unless changed by the parents. A married woman has the domicil of her husband. Residence is *prima facie* evidence of domicil; but no length of time is essential; and therefore if an adult person removes to a new residence, with the intention of remaining, it becomes his domicil immediately. The place where the family of a married man reside is considered his domicil, though he may do business in another place; and if the family have different places of residence for different periods of the year, that place will be the domicil, in which the head of the family exercises the rights of citizenship; but the domicil of a single man is usually the place where he transacts his permanent business. Every person must have a domicil some where; and therefore when a

domicil has once been acquired, it continues until a new one is acquired. These are the leading rules of local domicil, and they apply, for the most part, to national domicil. When a person has acquired a foreign domicil, and abandons it to return to his native domicil, the latter is re-acquired the moment the former is left. Diplomatic agents do not acquire a foreign domicil by residence abroad, but consuls and commercial agents generally do. It will thus be seen that domicil and citizenship have no necessary connexion. Our citizens may have their domicil abroad; and aliens may have their domicil here.

2. *Corporations.* The general rule is, that the existence of foreign corporations is recognized for all purposes and in all respects, except those specially prohibited by the domestic law. Subject to this exception they may make contracts, sue and be sued, establish agencies, and do any other acts to which they would be competent in the place of their domicil. They must dwell in the place of their creation, and cannot migrate elsewhere; but this does not hinder their rights from being recognized and protected elsewhere. (a)

3. *Husband and wife.* The general rule is, that the validity of a marriage depends upon the law of the place where it is celebrated. If valid there, it is valid every where; and if invalid there, it is invalid every where. The reason of this rule is found in the disastrous consequences which would follow from any other doctrine; and so strong is this reason, that the rule prevails even when persons have gone to a foreign country to marry, for the express purpose of evading the domestic law. The exceptions are with respect to incestuous marriages and polygamy; which, though lawful where they take place, are not recognized elsewhere. Some nations also expressly prohibit their own subjects from marrying any where unless according to their own laws, and therefore will not recognize other marriages. And the necessity of the case sometimes requires a resort to the law of the domicil, for want of a local law suited to the condition of the parties. With respect to the property acquired by marriage, the rule, so far as any is settled, seems to be this. When there is no change of domicil, the law of the place of the marriage will determine the rights of the parties as to personalty every where; but their rights as to realty, will depend upon the law of the place where it is situated. When there is a change of domicil after marriage, the law of the new domicil will govern future acquired personalty every where, but realty will still depend upon the law of its place. In either case, however, if there be a special contract on the subject of property, that contract will every where govern personalty, and to some extent

(a) This subject is very fully discussed in the case of the *Bank of Augusta v. Earle*, 13 Peters, 519.

realty. Finally, when parties marry in one place, with the intention of immediately settling in another, the law of the latter will govern their rights, because they are presumed to marry with that understanding. As to divorces, the rule is that a divorce lawfully obtained in the place where the parties were married and had their domicil, will be valid every where. It has also been held in this country, that if the parties have changed their domicil after marriage, a divorce granted in their new domicil for a cause occurring there, is valid every where, even in states where that cause would not have authorized a divorce. But when a party goes to another state for the express purpose of procuring a divorce, which he could not procure at home, such divorce being in fraud of the law of the domicil, will not be recognized there. Whether it would be recognized elsewhere, is an unsettled question. It is also held in this country that in determining what cause shall be sufficient for a divorce, the law of the forum and not of the marriage is to govern; and that one state will not grant a divorce for a cause which occurred in another, unless there be express legislation to that effect, as is the case in this state.

4. *Parent and child.* The only important question under this head is that of legitimacy, which is generally determined by the law of the place of the marriage. If by that law the issue be legitimate, they will be held legitimate every where else, at least with respect to heirship. But the converse is not always true. The law of Ohio, for example, makes children legitimate here, who would not be so by the law of the place of the marriage.

5. *Guardian and ward.* The general rule is, that the rights and powers of guardians are strictly local, and they can exercise no power over the persons or property of their wards, beyond the jurisdiction appointing them, and to which they are amenable. Our statute makes an exception with respect to the real estate of minors living out of this state, by allowing their guardians to sell it under the same regulations as guardians appointed here. But with this exception it follows that if the guardian change the domicil of his ward, as he may for good cause, he requires a new appointment or confirmation under the law of the new domicil; and the same is generally true, where the ward has property in different jurisdictions. The question who are minors, or otherwise subject to guardianship, depends upon the law of the place where they are when the question arises; and their capacities or incapacities depend upon the same law.

6. *Master and servant.* Under this head we need notice only slaves and apprentices; for the relation of principal and agent is nearly the same every where. With respect to slaves, the general rule is that slavery will not be recognized in any country whose laws prohibit slavery. And this is the doctrine held in the non-slaveholding states of this Union, except so far

as affected by the federal compact respecting fugitive slaves, which has before been commented upon. With respect to apprentices, the general rule is that foreign indentures of apprenticeship are of no binding force, unless the nature of the service, or the express provision of the indenture, contemplated a change of domicile. But the second section of the Ohio bill of rights seems to consider foreign indentures as binding here unless prohibited. For the words are—"nor shall any indenture of any negro or mulatto, hereafter made and executed out of the state, or if made in the state, where the term of service exceeds one year, be of the least validity except those given in the case of apprenticeships." But this is a departure from the general rule.

7. *Executors and administrators.* By our statute, authenticated copies of wills made and proved in any part of the world, according to the law of the place, are admitted to record here, and have the same effect, as if made here. And if a person die intestate out of this state, leaving rights or credits here, administration may be granted here. So if an executor or administrator be duly appointed elsewhere within the United States, he may sue here, and may sell real estate here, in the same manner as if appointed here. But these latter provisions do not extend to foreign nations; and therefore no foreign executor or administrator can sue or be sued, or otherwise judicially recognized here, by reason of his foreign appointment. New letters of administration must be taken out here according to our laws, and a settlement must be made of the assets found here; and all debts or legacies due here, must be paid out of such assets, before any thing is transmitted abroad, even though the estate were insolvent there. But the better opinion is that he is not liable to be sued here for assets received abroad. The next question relates to descent and distribution. With respect to real property, the rule is that the rights of dower, curtesy, and descent depend exclusively upon the law of the place where it is situated. But with respect to personal property the rule is, that it is to be distributed according to the law of the intestate's domicile, at the time of his death, wherever such property be situated. With respect to a will of personalty the rule is that if made according to the law of the testator's actual domicile it will pass personalty wherever it may be; but if not made according to the law of the domicile, it is not valid any where. With respect to a will of realty, its validity and effect must depend wholly upon the law of the place where the property is.

§ 249. *As to the law of property.* I shall consider this subject under three points of view, namely, as to real property, personal property, and contracts.

1. *Real property.* We have seen that immobility is the distinguishing characteristic of realty. Its situs never changes; and therefore if the soil of a nation could be subject to foreign domination, the very foundation of national independence would be

taken away. Hence the general rule is, that real property is governed exclusively by the law of the place where it is situated. This may be illustrated in several particulars. First, the capacity of persons to take or transfer real estate, depends not as in other cases, upon the law of their domicil, but upon the law of the place of the real estate. To this there is no exception in England or in this country. Secondly, the forms and solemnities of passing the title are governed exclusively by the law of the place. We have seen, however, that the law of Ohio, in relation to deeds, expressly recognizes any foreign deed executed according to the law of the place where it is executed; and in relation to wills, expressly recognizes a will, made and proved in any part of the world, according to the law of the place where it is made and proved; and it would be a great convenience if all the states would make similar provisions. Thirdly, the law of the place governs with respect to descent, dower, and curtesy. Lastly, the law of the place governs with respect to what shall be considered real estate, and all restrictions upon alienation or incumbrance. In a word, therefore, real property is wholly governed by the domestic law.

2. *Personal property.* The general rule is, that personal property has no *situs*, but follows the person of the owner; and consequently the law which governs it, is the law of the owner's domicil, and not the law of the place where it happens to be. Accordingly any transfer or disposition of personal property, which is valid by the law of the owner's domicil, is valid every where, unless perhaps, in the place where it was at the time, by reason of some prohibitory law of that place. The only kinds of personalty excepted, are such stocks or funds as are local in their nature, and require a particular mode of transfer by the local law; and perhaps some other things, to which the same reason applies. But it does not follow from the above rule, that a transfer not made according to the law of the domicil, but according to the law of the place where it is, would be invalid. For the benefit of commerce, such transfers will be sustained even in the courts of the domicil.

3. *Contracts.* Real contracts, or those which relate to real property, are exclusively governed by the law of the place where the property is situated, as we have already seen. Personal contracts include those which relate to persons only, or to personal property, or debts; and the general rule is, that the law of the place where a personal contract is made, every where governs the contract, as to the capacity of the parties to make it; as to its validity or invalidity; as to the formalities, proofs, and authentications of it; and as to its nature, obligation, interpretation, and consequences. There is however this general exception, that no nation will give effect to foreign contracts which violate the law of nature, or the law of God, or which contravene its own fundamental policy. And the rule itself presupposes that the parties

have not stipulated for the law of a different place. For if the contract is either expressly or impliedly to be performed in a different place from that where it is made, the law of the place of performance will govern, as to the validity, nature, obligation and interpretation of the contract. As between merchants residing in different countries, and keeping accounts with each other, the rule in adjusting balances is, that each transaction is to be governed by the law of the place where it originated. As to interest, the rule is, that it is to be governed by the law of the place where the contract is made, unless the parties had in view a different place of payment; in which case, the latter will govern. As to damages on protested bills, the place where each party contracts, will govern the amount he is to pay. Where money is payable by contract in one place, and is sued for in another, the creditor is entitled to recover an amount sufficient to pay for its remittance to the place of payment; and exchange is to be added or deducted accordingly. Days of grace are governed by the law of the place of payment. Contracts which stipulate no particular place of performance, are performable every where. A defence to or discharge from a contract, which is good by the law of the place where the contract is made or is to be performed, is good every where else. But with respect to discharges under the insolvent laws of the different states, we have seen, that owing to the peculiar relations of the states, this rule is so far modified that such discharges are only valid with respect to contracts made between citizens of the same state authorizing the discharge. And the converse of the rule also prevails, that a discharge by the law of any other place than that where the contract was made, will not, on that account, be valid elsewhere.

§ 250. *As to the law of crimes.* The general rule is, to consider crimes as altogether local, that is, exclusively cognizable and punishable within the jurisdiction where they are committed. Accordingly, one country does not take cognizance of the penal laws of another for any purpose whatsoever. This doctrine is carried out so strictly, that conviction of an infamous crime in one of the states of this Union does not render a witness incompetent in another state, unless by express provision, such as we have in this state; nor do the consequences of attainder in one nation, attach to the attainted person in another. In short, no nation pays any respect whatever to foreign criminal laws, except in surrendering up fugitives from justice. This is sometimes stipulated for by treaty and sometimes left to comity alone. In the absence of any positive compact, it is a subject of much controversy whether there is any binding obligation among nations to surrender a fugitive in any case whatever. In this country, the weight of authority is against the obligation. Such surrenders have been frequently made, and as frequently refused; and the result is, that unless the case is a very strong one, our tribunals

would refuse to order the surrender, and such refusal is no just cause of offence to the nation making the demand. But in this respect, the states of this Union, as we have seen, have ceased to be foreign with reference to each other, under an express compact in the federal constitution; and Congress has provided the manner in which the demand and surrender shall be made. (a)

§ 251. *As to the law of procedure.* The general rule is, that the law governing the remedy is the law of the place where the remedy is sought. Even where the right is determined by recourse to foreign law, the redress must be obtained according to the domestic law, for the obvious reason that our courts cannot be presumed to be acquainted with foreign modes of procedure; and also because the adoption of them would introduce endless confusion and uncertainty into our practice. But I shall consider the subject under several aspects.

1. *Jurisdiction.* Upon the question of jurisdiction, the rule is, that it can only be rightfully exercised, when either the person or thing is within the territory; for as judicial process cannot go beyond the territory, the attempt to exercise an extra-territorial jurisdiction would be a nullity. But on the other hand, the right of jurisdiction extends to all persons and things within the territory, except foreign ministers and their families and effects. In our tribunals foreigners may sue and be sued, in like manner as citizens, with the single exception of alien enemies; and to give them every assurance of an impartial hearing, we allow them to select the federal tribunals. Where the person only, and not his property, is within the jurisdiction, the judgment or decree cannot of course operate directly upon such property; but where the property is within the jurisdiction, though the person is not, the judgment or decree will bind the property. In such case, however, our statute requires notice to be given by publication, and if the person affected, did not receive this notice, time is given him to open the judgment or decree and have a hearing.

2. *Limitation of actions.* With respect to the limitation of actions the universal rule is that statutes of limitation belong to the remedy, and the law of the forum must govern. Courts therefore will not take notice of the statute of limitations of the foreign place where the cause of action accrued, but will be governed wholly by their own statute. We have seen, however, that Ohio has made an exception to this rule, in the case of foreign contracts, by providing, that if the right of action is barred by the law of the place where the contract was made, it shall be barred here.

3. *Discharges by bankruptcy or insolvency.* With respect

(a) The leading cases on the subject of surrendering fugitives are, the case of Washburn, 4 Johns. Chy. 106; Commonwealth v. Green, 17 Mass. 515; Commonwealth v. Deacon, 10 Serg. and Rawle, 123; and Rex v. Ball, 1 Amer. Jur. 297.

to bankrupt and insolvent laws, the American rule differs from the English. The English rule is that proceedings under the bankrupt law have a universal operation every where. We hold this doctrine only to a partial extent. Where no other rights intervene, the assignment under a foreign bankrupt or insolvent law passes the title of personalty to the assignees or commissioners; but such assignment is not good as against a subsequent attaching creditor here. And realty does not pass by such foreign assignment, unless the domestic law so provide. As to the discharge under a foreign bankrupt or insolvent law, the rule seems to be, that if the effect of the discharge be to extinguish the debt, by the law of the place of the contract, such discharge will be valid every where. But where the effect is only to take away some portion of the remedy, as the arrest of the debtor, such exemption from arrest is not elsewhere recognized. Such is the general principle of international law. But between the states of this Union, since no state can pass any law impairing the obligation of contracts, it is held that state bankrupt and insolvent laws can only operate upon contracts made between citizens of the state which enacts the law.

4. *Evidence.* The general rule respecting evidence is, that its competency must depend upon the law of the forum. But in the case of deeds, wills, and other instruments of writing, it would seem to be almost a matter of necessity, that the evidence which would be sufficient to prove their execution in the place where made, should be held sufficient every where. With respect to foreign laws, their existence must be proved like any other facts, before the court will take notice of them. And the same is true of foreign judgments. The mode of proof varies according to the nature of the case. The great seal of a nation is sufficient to authenticate a foreign written law or judgment, but not the seal of a court, except it be a court of admiralty. So a copy sworn to be a true copy, will be held sufficient. But the unwritten laws and usages of foreign nations are proved, either by the exhibition of printed reports, or by the oaths of persons having the means of knowing, or sometimes by the certificates of persons in high authority.

5. *Foreign judgments.* With respect to foreign judgments, we have already seen that the states, by a compact in the federal constitution, have ceased to be foreign to each other. The general rule is that foreign judgments, except in courts of admiralty, are not elsewhere held conclusive even upon the merits; but the original cause of action may again be investigated. As between the states, however, the rule is changed, and a judgment rendered in one state, when duly authenticated according to the act of Congress, must be held conclusive upon the merits in every other state. It does not, however, have the full efficacy of a domestic judgment; for execution cannot issue upon it, until it has been

converted into a domestic judgment by an action of debt. And the statute of limitations will operate upon this action, as upon any other. (a)

LECTURE XLII.

CONCLUDING REFLECTIONS.

§ 252. *Present condition of our jurisprudence.* We have now reached the end of this course of lectures; but before we part, let us indulge in a few reflections, which arise naturally from a retrospect of our past labors. And in the first place, you can now form some faint conception of the vast compass of the law; for without any very important omissions, that I am aware of, I have called your attention to all the prominent subjects about which the law is conversant; and pointed out their various bearings, relations, and dependencies. In no instance, however, have I attempted to descend to particulars; but while I have necessarily confined my sketches to the most general outlines, I have at the same time referred you to the sources of more detailed information. These sources you will hereafter consult; and you will find volumes written upon topics, for which my plan would scarcely allow pages. As yet, therefore, you have only caught transient glimmerings of the light which is to beam upon you hereafter. You have been preparing for the study of the law, but you have not yet fairly commenced it. You will devote months and perhaps years to subjects for which I could not spare hours; and if I have left no other durable impression upon your minds, I shall assuredly leave this, that a general course of lectures, like those to which you have been now listening, will not make you lawyers. In fact these lectures have had no such pretension. If they serve you for a guide-book, they will have fulfilled their design. I stated in the outset, that I should only undertake to *introduce* you to the study of the law; and while I trust I have done thus much, I am sure that I have done no more. The acquaintance which is to result from this introduction, you must make for yourselves; and it will be the work of no short time. If any of you have selected this profession, under the expectation that the learning required for it is of easy acquisition, it is well to have the error corrected now, while you are yet upon

(a) This subject has been fully discussed in the case of *McElmoyle v. Cohen*, 13 Peters, 312.

the threshold ; for be assured that nothing but days and nights of patient toil, unremittingly persevered in for years, can make any man, whatever may be his natural capacity, a consummate lawyer ; and they who cannot or will not undergo such toil, will do wisely to betake themselves forthwith to some other vocation. To skim over the surface as we have now done, is comparatively nothing ; you are to penetrate far into the depths ; and even then still lower deeps will remain to be explored. But in our rapid sketch of the structure of the federal and state governments, we have found the two so nicely adjusted to each other, as to form beautifully harmonious parts of one stupendous whole. I cannot use language too strong on this subject. When you come to examine with more leisure and attention, as you assuredly will, the department of constitutional law, I am persuaded you will do so with a growing sentiment of inexpressible admiration at the almost unerring wisdom and sagacity, which framed a system at once so complicated and so complete, without the aid of pre-existing models. From the commencement of civilization, the grand problem in politics has been, to attain the exact medium between anarchy on the one hand, and despotism on the other ; and a convincing proof of the matchless excellence achieved by our American sages at a single effort, may be found in the fact, that after half a century of trial, it is even now a debated question, whether the tendency of our system be more toward the one or the other of these two extremes of political evil. Of course the fair conclusion is, that we enjoy that golden mean so long looked for, but never before discovered. In fact, the wondrous fable of Minerva's birth here finds almost an actual parallel. There is no doubt that the most sanguine anticipations of those who framed this system have been more than realized. They expected that time and trial would disclose deficiencies, and demand amendments ; and they wisely made provision therefor. It is one of the transcendent beauties of the work they have left us, that it admits of *reform*, without revolution. We can *amend* it at any time, without first demolishing it. As the light of experience accumulates, we can take the full advantage of it, without even a temporary inconvenience. The stately machine continues to move on, though its parts be undergoing repairs ; and this crowning excellence of our organic law belongs equally to the subordinate departments ; for while our people can peacefully convene and amend their constitutions, our annual legislatures stand ever ready to supply defects in the rest of the system. Time has but to make known an error or deficiency in either, and abundant provision is made to correct or supply it. Let us then glance for a moment by way of recapitulation, at some of the more prominent changes suggested by our past observations.

§ 253. *Proposed constitutional amendments.* Of these I

shall indicate but three, about which I presume there cannot be much difference of opinion.

1. The exact *relations* between the federal and the state governments ought to be definitely ascertained. The *nature of our Union* ought not to be matter of controversy. The deeply agitating questions of state rights, secession, nullification, and the like, ought to be put for ever at rest. If the states be in fact bound together effectually, as with an adamantine chain, we ought to know it, that we may enjoy the confidence thereby inspired; if with a mere rope of sand, still we ought to know it, that we may be prepared for the worst. One way or the other, these high questions should be settled, by the most solemn and explicit declarations of the people, in the form of a constitutional amendment. I may indeed be told, as I in fact believe, that no reasonable doubt ought to exist upon these points, as the constitution now stands; but the truth is, that a wide and radical difference of opinion does exist; and whether reasonably or not, is of no consequence to the proposition; for such topics are too momentous even for plausible cavil.

2. The extent of *incidental powers* ought to be more exactly ascertained by the constitution itself. Many indeed may think with me, that there is no room for doubt at present; but as a matter of fact, we know that there is doubt. These powers have been a fruitful theme of contention ever since the first organization of the government; and there is no prospect that the controversy will cease, until the people shall speak their will definitively, through the constitution itself. I would particularly mention four of the incidental powers, which pre-eminently deserve attention, on account of their vast importance; namely, the power of acquiring new territory, of making internal improvements, of protecting domestic industry, and of creating a national bank. Powers of such magnitude as these, ought not to be left to inference. They should be declared to exist or not to exist, to be granted or withheld, in a manner which cannot be misunderstood. Certainty either way, would be better than the present uncertainty.

3. The vast *patronage* of government ought to be placed under the most jealous control. On this point it would seem as if there could not be two opinions. Surely corruption will find its way into our politics rapidly enough, without the resistless allurements of bribery, under the name of patronage. On this subject the lessons of history are not to be mistaken. It may indeed be said, that Congress already has the power so to regulate *appointments* and *salaries*, as to prevent all danger from this quarter. No doubt much might be done under the existing provisions of the constitution, by a different course of legislation. But unquestionably the most effectual corrective of the present evil, would be so to amend the constitution as to make the presi-

dent eligible for one term only. Under any possible arrangement, a tremendous patronage must be at his disposal; and by this amendment, all temptation to employ this patronage during the first term, in securing suffrages for the second, would be taken away. Having once reached the highest eminence to which political ambition can aspire, and having nothing more to gain, but every thing to lose, by disgrace or dishonor, we may reasonably presume that his sole study, even on selfish principles, would be, to fill and leave with honor a place he could not fill again. But time will not permit me to dwell on these topics; and I pass to the other departments of law.

§ 254. *Proposed extension of the civil code.* The important subject of legal reform has been frequently alluded to, both in general and in detail. I now propose merely to recapitulate and bring together some of the more important suggestions heretofore made. And at the outset, there is one primary measure of reform, which is capable of being so conducted, as to include all others. I refer to the project of *enlarging our civil code*, which has already been discussed under the head of codification: and lest I may be misapprehended in the views before expressed, let me here say, that I do not suppose a perfect code can at once, if ever, be produced: but I cannot be mistaken in believing that a gradual approximation to a complete code may be effected; and that every effort towards such a result must produce great good. Our criminal law has been codified, though not with much systematic skill: but the other divisions of law, except here and there an isolated provision, have never received a legislative sanction. And let us suppose that a philosophic stranger from a distant land, having read and admired the theory of our social system, should visit us for the purpose of becoming a citizen, if he should find our theory realized in practice. He would naturally apply to some eminent jurist, for a reference to the books in which he might find the law regulating his personal and proprietary rights. And what would this jurist be obliged to tell him? Instead of pointing to an American code, the result of American legislation, and in harmony with the rest of the system, he must refer the stranger to an immense law library, composed, more than two thirds, of English books, which it would require years to read; and must tell him to search through that library for the knowledge he wanted. But how could he satisfactorily account to such a stranger, for the fact, that with the most ample provision for all needful legislation, our statute book as yet contained only a few disconnected provisions, scattered here and there over the wide surface of the law, to fill up chasms, but furnishing no complete view of our law on any single subject? This illustration of the importance of enlarging our civil code, has always struck my mind with great force. The limits of written law ought certainly to be much extended, even though unwritten law should not be

wholly superseded. The great point is to introduce positive enactments in place of judicial decisions. At present judicial discretion is of two kinds: the one consists in applying fixed principles to new cases: the other, in overruling former principles, and substituting new ones. Now this latter kind of discretion always produces evil; and this is what a code would supersede, so far as it should extend. Judges, who do not scruple to overrule precedents, would not think of questioning positive enactments. As to the other kind of discretion, which applies settled principles to new cases, it must always exist, whether we have a code or not; but it would be diminished in exact proportion to the completeness of the code. At all events, it could not be increased: for the common law might still prevail, where the code should be silent. But I cannot pursue the argument, though I feel deeply impressed with the importance of the subject. Unless I greatly mistake the tendency of the times, this great enterprize is destined to occupy a wide space in the minds of the generation in which you are to be the actors; and as the extension of our civil code will furnish the most favorable opportunity for reforming the existing law, I will now recapitulate some of the changes which our past inquiries have suggested as expedient.

§ 255. *Proposed changes in the law of persons.* In the *law of persons*, we have found some evils which undoubtedly admit of remedy, and some which may justly excite apprehension, without much hope of remedy.

1. As to *slaves*. The wide prevalence of slavery is a subject upon which conjecture is utterly at fault. Like the national debt of Great Britain, its extinction baffles all calculation. One thing is certain, that the federal government cannot interfere with it, in the states where it exists, without violating a compact of peculiar sacredness, without which the Union could not have been formed, and cannot now be preserved; but all else is doubtful. Which ever way we turn, shadows, clouds and darkness rest upon the prospect. Can the Union survive the strife which threatens to be carried on with increasing violence, between the advocates and opponents of slavery? This is a fearful question, which time only can answer.

2. As to *aliens*. We have an immense vacant territory, which is fertile beyond example, and sold so cheap that almost every man is able to buy it. To the foreigner, therefore, we hold out every temptation to quit the crowded settlements of the old world, and seek ease and abundance here. Upon his first arrival, we extend to him the privilege of a freeholder; and in five years, by taking the proper steps, we admit him to all the privileges of an American citizen. The natural consequence is, that Europe is annually pouring her thousands into our rushing stream of population. They come for the most part uneducated, at least in the great lessons of republicanism; and who can tell what is to be

the ultimate consequence to our institutions? Will they always be safe in the hands of a population, so large a portion of whom are not born and bred to understand and love them, and who owe to them at best only a divided allegiance? Would not a longer probation for citizenship have been wiser in the first instance? Is it now too late to make the experiment? These are questions of deep moment, upon which all of us should have our minds definitively made up.

3. As to *Indians*. The condition of the Indians is a cause of sorrow rather than apprehension. Whose fault is it, that the original occupants of the American soil are dwindling away by their contact with civilization? Would a different policy have left them in as good a condition, as that in which the Europeans first found them? Can anything now be done to save them from that utter extinction, towards which they seem to be fast hastening? I state these questions, because they are of deep and mournful import. Our country must one day answer them to the enlightened world; and it is our individual duty to examine them with care, that we may form our own opinions understandingly.

4. As to *married women*. On this subject reform is loudly called for. There is no foundation in reason or expediency, for the absolute and slavish subjection of the wife to the husband, which forms the foundation of her present legal relations. The law ought to furnish some means by which, in case of emergency, she can protect herself from the utter ruin, in which he now has the power to involve her. Were woman, in point of fact, the abject thing which the law in theory considers her to be when married, she would not be worthy of the companionship of man. But I have before enlarged sufficiently upon this topic.

5. As to *debtor and creditor*. Humanity requires that the person of a debtor should not be at the mercy of his creditor; and the law has in most places met this demand, by abolishing or qualifying imprisonment for debt. But on the other hand, justice requires that all a debtor's property should be scrupulously subjected to the payment of his debts; and that every facility should be furnished to the creditor, for securing payment when there is property out of which to make it. This cannot be done, unless the utmost precaution be taken to prevent insolvent debtors from concealing their means of payment; and in this respect, our law stands greatly in need of modification.

§ 256. *Proposed changes in the law of property*. In the *law of property* there are also some topics of strong interest to the friend of reform; among which are the following:—

1. *As to the public domain*. This is in every point of view, a subject of deep anxiety. The first difficulty is to determine upon the best scheme for disposing of it; and upon this opinions are widely different. Another more serious difficulty may grow out

of the exclusive claims advanced by some of the states, to the portions situated within their respective limits, in violation of the fundamental condition, upon which the whole was ceded to the United States. But the gravest question relates to the rapid formation of new states, which are extending the limits of the Union far beyond what was originally contemplated. Whether the effect of this extension will be to make us the greatest nation on the face of the globe, or to break our Union asunder by its own increasing weight, is an awful problem, which a few generations must determine one way or the other.

2. *As to the law of remainders.* We have seen that this immense fabric has been built upon reasons which no longer exist. It is perhaps well to allow men to make future limitations of their property, within the boundaries prescribed, by the statute against perpetuities; and if so, it is certainly desirable that this should be done in the most simple and certain manner; whereas, the present law of remainders is, beyond any other branch of law, complicated and uncertain. Now a single enactment would in a great measure remove this objection. It is only necessary to apply to remainders created by deed, the present doctrines of executory devises, or, in other words, to give to deeds the same capacity of future operation, that wills already have, and to this there can be no inherent objection. The main prop of the present fabric, as we have heretofore seen, is the particular estate which precedes the remainder. By the reform proposed, this prop being withdrawn, the fabric itself would be dispensed with. While at the same time, the object of creating remainders would be equally well attained, and in a far simpler manner.

3. *As to mortgages.* We have seen that the design of a mortgage is to give the mortgagee a lien upon the property of the mortgagor, to secure the payment of a debt; but that when the time arrives, if the debt be not paid, the mortgagee may sue for the debt, bring ejectment for the land, and foreclose the mortgage in chancery, all at the same time, or either first, at his option. Now, this makes the nature of a mortgage much more complicated than its object requires it to be; while it gives the mortgagee the power of unnecessarily harassing the mortgagor. If the form of a mortgage were changed so as to give it no other effect than that of a common lien, the law would be greatly simplified without injury to either party. The mortgagee's security would be equally good, his remedy even more speedy, and the rights of the mortgagor would be equally well protected. Whereas, at present, owing to the fact that the equitable construction put upon a mortgage, is entirely different from its original legal effect, the law of mortgages is greatly wanting in symmetry and simplicity.

4. *As to descents.* In prescribing the rules by which property shall descend, the law proposes to effectuate the presumed wishes

of the deceased. On this ground, as we have seen, it makes *ancestral property*, descend in the blood of the ancestor from whom it came, though in so doing it should pass into hands very remote from the last owner. The expediency of this arrangement may perhaps be doubted; but I mention it here, to show how much regard the law professes to pay to the presumed wishes of the deceased. And now, I ask, why it does not carry the principle through the whole law of descent? We have seen that husband and wife are the very last persons to inherit to each other, being postponed to the most remote relative that can be found. This certainly cannot be the presumed wish of the deceased in any supposable case. Next to children, and perhaps equally with them, the husband or wife should be provided for on the principle assumed; and it seems to me, that the law ought to be so changed as to make this provision. I would further suggest, that the rule in *Shelley's case*, ought to be abolished, with respect to deeds as well as wills. It professes to be a rule of construction designed to effectuate the intentions of those who make settlements of property; and yet no one can doubt that in nine cases out of ten, it directly frustrates their intentions, by attaching to their language a meaning not deducible from its natural import. It gives a fee simple where a life estate only was intended; and thus cuts off the heirs from the limitation expressly made for them. They may perchance take by descent; but it is only a chance, and not that certainty which must have been intended by the person making the settlement.

5. *As to conveyances.* The simplicity which prevails in the transfer of personalty is perhaps all that can be desired; but it would be a great improvement, if there were some specific provision, as to what shall constitute a contract of sale. In like manner, our conveyances of realty are so much more simple and expeditious than the ancient common law conveyances, that we have little room for complaint. But the inexcusable redundancy and surplusage of deeds, is an abuse which ought not be tolerated. The mere statement of this proposition, must carry conviction of its truth.

6. *As to contracts.* The principal objection to the present law of contracts is found in the distinction between sealed and unsealed contracts. Abolish this, and the law of contracts would be as simple as could be desired. I am unable to conceive of a single argument in favor of continuing the use of private seals. They perpetuate a thousand distinctions without any corresponding benefits. Perhaps another improvement would be, to extend the doctrines of negotiability to a greater number of contracts. At all events there is no reasonable foundation for the present doctrine, that contracts in general cannot be assigned. They can be assigned in equity, and indirectly in law; and why not remove the restraint entirely? I can perceive no evil which would coun-

terbalance the benefit of simplicity. Credit and traffic are now so widely extended, that such restraints are often very serious inconveniences.

§ 257. *Proposed changes in the law of crimes.* In the law of crimes, the grand improvement has already been made, by superseding the common law, in the definition of crimes and punishments. Our criminal enactments are pre-eminently characterized by simplicity and humanity. But even here, some improvements may be suggested.

1. *As to definitions.* The present system is to make the definitions of crimes as specific as possible. This has been illustrated by the examples of perjury, forgery, burglary, arson, and the like. Now the danger in such cases is, that some particulars will be omitted. Whereas, there could be no danger in using general terms sufficiently comprehensive to include all possible particulars. And the brevity thereby attained, would be an additional motive for the change.

2. *As to punishments.* Whether capital punishment ought to be abolished, and solitary imprisonment for life substituted in its place, is a question of great interest, which I shall not here discuss. All agree, however, that if executions are to continue, they ought to take place *in secret*. In like manner, public opinion is strongly inclining in favor of *solitary*, instead of promiscuous confinement. But the *abolition of fines* seems to be the reformation most required, as well on the ground of their inequality, as their inefficiency. If they do not actually encourage crimes, they certainly do very little to prevent them; and they look too much like a sale of criminal licenses. Lastly, the *repetition* of offences ought to be provided against by increased penalties. When an offender repeats an offence, this is proof that the former punishment was not sufficient; and the law should be imperative, in increasing the punishment.

§ 258. *Proposed changes in the law of procedure.* In the law of procedure there is abundant room for improvement, particularly in common law proceedings; for as to chancery and criminal proceedings, they are perhaps as simple and certain, as we can expect to make them. The only prominent objection is to their length and redundancy, a common fault of all judicial proceedings; but the English forms have been so much pruned and corrected even in this respect, that we ought to congratulate ourselves, rather than find fault. Our common law proceedings, however, are complicated, burthensome, and unwieldy, beyond all reason. The leading improvements suggested, are as follows.

1. *As to the forms of action.* We now have three distinct *actions of contract*; while in reason there can be no imaginable necessity for more than one. Indeed, by abolishing seals, as before suggested, the action of covenant would at once be dispensed with; and then debt and assumpsit could be readily consoli-

dated. Again, there are five distinct *actions of tort*, while there can be no occasion for more than two; one to recover the specific thing, as in *replevin*, and the other to recover damages for injury or detention. Again, though we have gained much by extending the scope of *ejectment*, so as to supply the place of all real actions, yet that action would itself be greatly improved by striking out all the fictions, and adapting the language of the proceedings to the object they are now intended to effect. By these three measures, the law of remedies would be immensely simplified; but this is not the limit of improvement. The grandest step of all would be, to adopt the forms of *chancery proceedings* in all civil cases, leaving the principles of law as they now are. These forms are as simple and rational as we can ever hope to devise; and they are abundantly adequate to all civil remedies.

2. *As to the pleadings.* To say nothing of the style and language of pleading, which are wholly destitute of neatness and elegance, there is a still more substantial objection to the present system. I refer to the wide prevalence of *general pleading* as distinguished from *special*. The object of all pleading is to apprise each party accurately of the grounds assumed by the other. *Special pleading* effects this; *general pleading* does not. The *common counts* and *general issues* convey no intimation of the matters to be relied on at the trial. They may be convenient for counsel, but the ends of justice would be far better attained, by requiring each party to disclose his case fully.

3. *As to evidence.* The object of all the rules of evidence should be to establish the truth; and in order to effect this object, and thus do complete justice between the parties, it is necessary to obtain all the light which can be had from every available source. Against false swearing, we have the restraints of moral and religious obligation, and the penalties of perjury; moreover the jurors are competent to determine whether, under all the circumstances, a witness is to be believed or not. Is there then any occasion for allowing the question of *competency* to be raised? I can see no good end that it answers. On the contrary, I believe that in the average of cases, the ends of justice would be far better attained by admitting all persons, the parties themselves, persons interested, and even convicts, if they know any thing relevant to the matter in issue, to give in their testimony, and let it pass for what it is worth. The wide latitude of cross-examination, the astuteness of counsel, and the good sense of jurors, make it highly improbable that a false witness would escape detection. At all events, the evil would be less than that which now results from the frequent exclusion of testimony which may be indispensable.

I have thus recapitulated some of the more prominent points, in which our law, though in the main so excellent, may admit of improvement; and I commend them to your serious and deliberate consideration. During the period in which you are to be actors

on the public stage, the topics I have been suggesting, will be among those of the most absorbing interest. Even the existence of our Union, if not of free government itself, may be involved in some of them. It is the part of wisdom, therefore, to examine them in all their bearings, that your opinions may be fully made up, when the time comes for action.

§ 259. *Ways and means of professional success.* It would seem appropriate that I should close this lecture with some suggestions respecting professional success. I presume you have not selected the law as a road to great wealth; for if so, you are almost sure to be disappointed. No lawyer in this country can become very rich in the strict pursuit of his profession. If great and rapid gains be your object, there are many vocations to be chosen before this. But if properly pursued, it will lead to independence, which is all a wise man need desire. And as to reputation, it opens an ample field. Tastes may differ on this subject; but for myself, had I the most burning thirst for fame, I would rather be a great jurist than a great statesman or hero. To answer, therefore, the question, what is included in the idea of professional success, I would say that it embraces moderate emolument and high reputation; or, in other words, that he, who, at the end of his career, has acquired a reasonable independence and an honored name, has been a successful lawyer. The question then is, what are the conditions of success as thus defined? Undoubtedly the first condition of all success is to deserve it. And this is pre-eminently true of success at the bar, which cannot be the result of luck or chance. Accident has made many a hero, and many a king, but never a Mansfield or a Marshall. And, on the other hand, there is a moral certainty of success, if you do but deserve it. You will not have it suddenly, for it is a plant of slow growth. You must take, not days or months, but years into the account. And as certainly as those years come round, so certainly will success come with them, if it be deserved. Indolence may excuse itself by the miserable plea of fatalism, that merit is not sure to meet its reward. But this is an error as pernicious as it is stale. Every observer knows that there is a sure retribution even in this world. Public opinion may err for the moment, but in the long run it always comes out right. The question then is reduced to this. How are you to deserve success in your profession?

The first requisite certainly is a competent knowledge of the law. This has been sufficiently dwelt upon already. But I will add, that it is not enough to know and have the precise books, in which this knowledge can be had. It must be ready, available knowledge. You must have it at your tongue's end, or it may come too late for use. At first, this condition is hard to be complied with; but it will become easier as you advance. Every case will be a lesson. Your whole professional life will be one of

progressive improvement. Item after item will be daily added to the sum of knowledge, until you find yourselves accomplished at all points. Prepare your first case thoroughly, and this will not only gain you a second, but enable you the more easily to master it. Thus every step you take will prepare you, with less effort, to step still higher, until you reach that eminence where toil is at an end.

But a competent knowledge of the law, although the first, is not the only condition of success. The most learned of lawyers would not get business, if he did not attend to it. The question with the client is, who will manage his cause the best? And other things being equal, he will manage a cause the best, who devotes most attention to it. Next to legal knowledge, therefore, the most important condition of success is, a habit of strict attention to business. Your clients must know where to find you and when to find you. Once establish a reputation for attending faithfully to whatever you undertake, and this alone will secure you a good share of business. But in order to do this, you must make the law your exclusive pursuit. You cannot be men of all work and lawyers besides. In this country the temptation is strong to diverge from the profession, either for the sake of speculation or politics. Our young men are anxious to make money faster than by fees, and therefore enter upon a course of speculation; or to gain notoriety faster than by regular practice, and therefore plunge into politics. But either course is fatal to distinguished professional success. The law cannot be put on and taken off like a garment. It requires all the energies you can command; and just in proportion as you direct them to other pursuits, you discourage clients from employing you, because you disqualify yourselves for attending faithfully to their interests.

Supposing, then, that you have a competent knowledge of the law, and that you attend strictly to business, is any thing more required? Undoubtedly one thing more, and that the greatest of all; I mean professional integrity. Be not misled by the false idea that cunning can be successfully substituted in its place. Now and then a trick or stratagem may succeed; but in the end chicanery always ruins him who practises it. Be as acute and discriminating as you please, but by all means avoid artifice. It never yet raised a man to honorable distinction. A cunning lawyer, if not a knave, is very likely to be mistaken for one; whereas, uncompromising probity is sure to win confidence in every quarter. You will find it as true in your practice, as in geometry, that the straight line is always the shortest distance between two points; and that the most adroit manœuvring or finesse can never prove a match for downright integrity. The rule I would inculcate not only excludes all indirection in doing business, but in obtaining it. Were I to concentrate in a single word whatever I can conceive of despicable in our profession, it

would be pettifogging. I would have you feel that it is infinitely better to wait years for a case, than to obtain it by fomenting litigation. Dig or beg, if necessity drive you to it, and it will be respectable ; but resolve to starve, sooner than prowl about courts for human victims. I am the more anxious to dwell upon the necessity of professional integrity, because the moral character which should belong to our profession, is often egregiously misconceived or misrepresented. The vulgar notion is that lawyers are seldom honest men. Because the profession abounds with opportunities for the practice of dishonesty, and because occasionally lawyers have been found who have no scruples on this score, the exceptions are perversely mistaken for the general rule, and the more ignorant part of the community seem really to believe that the conscience of every lawyer can be bought and sold. They also affect to find scripture authority for this prejudice, in the woe so emphatically denounced upon lawyers ; not knowing that a very different sort of lawyers are there anathematized. But the most efficient cause of this wholesale libel upon the profession, is to be found in the fact, that with very few exceptions, wherever you find a lawyer introduced into the popular fictions of the day, you find him represented as an arrant knave. I need not refer to instances, for hundreds will suggest themselves. You can scarcely call to mind a novel or a drama, where a lawyer figures at all, in which he is not made use of to help out some infamous scheme of villany. In fact, I have heard this very circumstance adduced to prove that rascality must be a prominent attribute of the profession. But be the cause of the misconception what it may, we know the fact to be, that popular sentiment is greatly against us, inasmuch that the question is often asked, whether the world would not be better off if there were no lawyers. No doubt it would be a happy state of society in which lawyers could be entirely dispensed with ; for it would be that perfect state in which laws themselves would be superfluous ; and it may also be admitted that just in proportion as laws become simple and certain, the demand for lawyers will grow less, because litigation, which is their aliment, will be correspondingly diminished. But so long as the litigious spirit exists among mankind, and the uncertainty, which belongs to all human affairs, furnishes occasion for its exercise, the principle which requires a division of labor in all other cases, will require it also in this ; and we may safely conclude that a distinct class of men will always be required to conduct the litigation of their fellow men. Indeed those who join in the obloquy so generally cast upon us, seem to forget that in so doing they reproach mankind in the mass. Let the demand for lawyers be diminished, and the supply will correspond. Let men cease to be contentious, and be always ready to do right without compulsion, and lawyers will not trouble them. But while it is evident that without dishonest

clients there would be no dishonest lawyers; and that as a profession we are grossly belied by this indiscriminate censure; yet it may perhaps be safely admitted, that the standard of professional ethics is not always as elevated, as the honor of the profession requires it should be. In fact it is by no means easy to fix a precise standard. There is not perhaps a more difficult question in casuistry, than that which every lawyer has to decide, in determining the nature and extent of his professional obligations. We are however, to remember, at the outset, that in becoming attorneys, we do not cease to be moral agents; that in pledging our services to our clients, we do not also pledge to them our consciences; and therefore that no principle can justify us in doing, or our clients in requiring us to do for them, what we should blush to think of doing for ourselves. It is also obvious, that even on selfish principles, honesty is the best policy for us, as it is for all other men; and therefore that in consultations with clients, we are not only morally bound to tell them frankly our real opinions, but it is manifestly our interest so to do, because otherwise we shall soon cease to be consulted. Again, it is clear that in conducting proceedings through the various stages of litigation, we can never be justified in attempting to mislead either the court or jury, by wilfully misrepresenting the law or the facts. Thus far there can be no room for hesitation. But if we believe that our client has the wrong side, and have candidly told him so, are we then justified in undertaking his cause, if he should persist in having it litigated? This is a question of no small difficulty, and it arises in two classes of cases; namely, first, when we believe the law to be against our client; and, secondly, when though the law may be with him, the abstract justice of the case appears to be against him. With regard to the first, when we think the law to be against him, it would seem that after so informing him, if he should still persist, we need not hesitate to act for him; because we are not infallible, and peradventure the law may turn out to be the other way; or he may have justice on his side, though the law may seem against him; and in either case, he ought not to be cut off from the chances of litigation. The chief difficulty then arises in the second class of cases, where we believe right and justice to be against our client, though the law may be with him. But even here, I have come to the conclusion, that no principle of moral obligation prohibits me from prosecuting his cause. In the first place, I am not an infallible judge of right and wrong, and possibly I may be mistaken; but at all events I am not his conscience keeper. I undertake only to assert his legal rights; and if, in so doing, I make use of no chicanery or deception, I come out of the cause with clean hands. The question of abstract justice is with him, and not with me; and I am as much justified in conducting his cause, as the judge is in deciding it for him. But there is another more comprehensive

view conducting to the same result. Every man, as a general condition of the social compact, has a right to have his case fairly presented before the court; and it is the province of counsel to assist him in so doing. Now although there may be particular cases which considered by themselves, ought not to be prosecuted, yet as no line of demarcation can be drawn beforehand, to indicate which these are; if it were the duty of counsel to decide in each case, the preliminary moral question, whether they ought to undertake it, their decision against any case would be a prejudging of its merits, which might operate prejudicially upon the final result; and on this account it is a good general rule, that counsel are not to be held responsible for the moral character of the cause they advocate, but only for the manner in which they discharge their duty. This reasoning may be fallacious, but it has satisfied my own mind. I desire however to be distinctly understood. I abhor, as much as any one, the rascally maxim, that every thing is fair in litigation. I hold that the greatest fee ever offered is no justification for attempting to gain a cause by dishonest means; and I look upon that lawyer as essentially a knave, who practises upon such a doctrine. Such then are my views of professional integrity, as indispensable to professional success. I have considered the question chiefly in a worldly point of view. And the result is, that if there were no such thing as religious or moral obligation, it would still be true, that the strictest honesty is the lawyer's wisest policy. Confidence and trust are the life-blood of his being; and the Allwise Creator has ordained that integrity alone can inspire confidence and trust. Set out, then, with the unwavering purpose, that come what may, you will hold fast to your integrity; and that the world may always know where to find you, by simply considering where you ought to be found. Let this unbending integrity co-operate with a daily increasing knowledge of the law, and a faithful attention to the business committed to you, and your success is as certain as any thing future can be.

APPENDIX.

No. I. DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

The Unanimous Declaration of the Thirteen United States of America.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires, that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation, till his assent should

be obtained ; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected ; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise, the state remaining, in the mean time, exposed to all the dangers of invasion from without and convulsions within.

He has endeavored to prevent the population of these states ; for that purpose obstructing the laws of naturalization of foreigners ; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws ; giving his assent to their acts of pretended legislation :

For quartering large bodies of armed troops among us :

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states :

For cutting off our trade with all parts of the world :

For imposing taxes on us without our consent :

For depriving us, in many cases, of the benefits of trial by jury :

For transporting us beyond seas to be tried for pretended offences :

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies :

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our governments :

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind—enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world, for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connexion between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

No. II. ARTICLES OF CONFEDERATION.

To all to whom these presents shall come, we, the undersigned, delegates of the states affixed to our names, send greeting.

WHEREAS, the delegates of the United States of America, in congress assembled, did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the independence of America, agree to certain articles of confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz.

Articles of confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this confederacy shall be "The United States of America."

ART. II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in congress assembled.

ART. III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states—paupers, vagabonds, and fugitives from justice excepted—shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any state, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the government or executive

power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year; with a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No state shall be represented in congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in congress assembled, each state shall have one vote.

Freedom of speech and debate in congress shall not be impeached or questioned in any court, or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to, and from, and attendance on congress, except for treason, felony, or breach of the peace.

ART. VI. No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the United States in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the United States in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and

shall provide and constantly have ready for use, in public stores, a due number of fieldpieces and tents, and a proper quantity of arms, ammunition, and camp-equipage.

No state shall engage in any war without the consent of the United States in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States in congress assembled, can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in congress assembled; unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in congress assembled, shall determine otherwise.

ART. VII. When land forces are raised by any state for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment.

ART. VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in congress assembled.

ART. IX. The United States in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas—and establishing courts for receiving and determining finally appeals in all cases of captures; provided, that no member of congress shall be appointed a judge of any of the said courts.

The United States in congress assembled, shall also be the last resort

on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states, concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following; Whenever the legislative or executive authority, or lawful agent of any state in controversy with another, shall present a petition to congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of congress, to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination. And if either party shall neglect to attend at the day appointed, without showing reasons which congress shall judge sufficient; or being present, shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "*well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward.*" Provided also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdictions, as they may respect such lands, and the states which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states—

fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated—establishing and regulating post offices from one state to another, throughout all the United States, and exacting such postage on papers passing through the same, as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing g their operations.

The United States in congress assembled, shall have authority to appoint a committee, to sit in the recess of congress, to be denominated “a committee of the states,” and to consist of one delegate from each state—and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years—to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled: but if the United States in congress assembled, shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same; in which case, they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled.

The United States in congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased,

or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in congress assembled.

The congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ART. X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress, as the United States in congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with; provided, that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the United States assembled, is requisite.

ART. XI. Canada, acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ART. XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof, the said United States, and the public faith, are hereby solemnly pledged.

ART. XIII. Every state shall abide by the determinations of the United States in congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to by a congress of the United States, and be afterwards confirmed by the legislature of every state.

And whereas, it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify, the said articles of confederation and perpetual union:—Know YE, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide

by the determinations of the United States in congress assembled, on all questions, which, by the said confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in congress. Done at Philadelphia, in the state of Pennsylvania, the ninth day of July, in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America. [*The names of the signers are omitted.*]

No. III. ORDINANCE OF JULY 13TH, 1787.

An ordinance for the government of the territory of the United States, northwest of the river Ohio.

BE IT ORDAINED, by the United States in congress assembled, that the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress. make it expedient.

Be it ordained, by the authority aforesaid, that the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grand-child, to take the share of their deceased parent, in equal parts, among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have, in equal parts, among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her,* in whom the estate may be, (being of full age) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale,† signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses,‡ provided such wills be duly proved,

* This provision did not confer upon a married woman the power to make a will; but the law in this respect was subsequently changed. 5 Ohio R. 69, and Statutes there cited.

† Under the Ordinance, no transfer of real estate, without deed, could be valid or effectual in law. 1 Ohio R. 214.

‡ This provision, so far as it required the attestation of two witnesses to a deed, was repealed by T. L. c. 51, § 8, and T. L. c. 172, § 3. 1 Ohio R. 9.

and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, that there shall be appointed from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings, every six months, to the secretary of congress. There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to congress, from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards, the legislature shall have authority to alter them as they shall think fit.

The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers. All general officers shall be appointed and commissioned by congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made, shall have force in all parts of the district; and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian title shall

have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: provided that for every five hundred free male inhabitants there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which the number and proportion of representatives shall be regulated by the legislature; *provided*, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; *provided also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representative thus elected, shall serve for the term of two years, and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress, any three of whom to be a quorum, and the members of the council, shall be nominated and appointed in the following manner, to wit: as soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two person, qualified as aforesaid, for each vacancy, and return their names to congress, one of whom, congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the term of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress, five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The

governor shall have power to convene, prorogue, and dissolve the general assembly, when in his opinion, it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office—the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house, assembled in one room, shall have authority by joint ballot to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments; which for ever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and for ever remain unalterable, unless by common consent, to wit:

ARTICLE I. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

ART. II. The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for capital offences, where the proof shall be evident or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever, interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.

ART. III. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools, and the means of education shall for ever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity, shall, from time to time, be made, for preventing

wrongs being done to them, and for preserving peace and friendship with them.

ART. IV. The said territory, and the states which may be formed therein, shall for ever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alteration therein, as shall be constitutionally made; and to all the acts and ordinances of the United States in congress assembled, conformable thereto. The inhabitants and settlers in the said territory, shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them, by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and for ever free,* as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

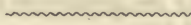
ART. V. There shall be formed in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western state in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn, from the Wabash and Post Vincents due north to the territorial line between the United States and Canada, and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line; provided, however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered, that if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies

* This provision does not abolish or impair the common law principle, that he who owns the land upon both banks, owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement. 3 Ohio R. 496. If, however, a dam be erected in obstruction of the navigation, and loss sustained in consequence, by navigators, the owners are responsible. 5 Ohio R. 414.

north of an east and west line drawn through the southerly bend or extreme of lake Michigan: and whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatsoever; and shall be at liberty to form a permanent constitution and state government: *Provided*, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

ART. VI. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted: *Provided*, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained, by the authority aforesaid, that the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby repealed and declared null and void.



No. IV. CONSTITUTION OF THE UNITED STATES.

WE, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION I.

1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECTION II.

1. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION III.

1. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

5. The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of

honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof: but the congress may at any time by law, make or alter such regulations, except as to the places of choosing senators.

2. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from, the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION VII.

1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the presi-

dent of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days, (Sundays excepted,) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the supreme court:

10. To define and punish piracies, and felonies, committed on the high seas, and offences against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

14. To make rules for the government and regulation of the land and naval forces:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding ten miles square,) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:—And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

1. The migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the *census* or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties, in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

SECTION X.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then, from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be vice president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice president.

4. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office

who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

9. "I do solemnly swear, (or affirm,) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

SECTION II.

1. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may by law vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SECTION III.

1. He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient: he may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper: he shall receive ambassadors and other public ministers: he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV.

1. The president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION II.

1. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION III.

1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION I.

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress

may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

1. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

2. The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION IV.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

1. The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

2. This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in

cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

1. The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice

president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But, in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice president, shall be the vice president. if such number be a majority of the whole number of the electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president; a quorum for the purpose shall consist of two thirds of the whole number of senators; a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice president of the United States.

NO. V.—CONSTITUTION OF THE STATE OF OHIO.

WE, the people of the eastern division of the territory of the United States, northwest of the river Ohio, having the right of admission into the general government, as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of one thousand seven hundred and eighty-seven, and of the law of congress, entitled "An act to enable the people of the eastern division of the territory of the United States, northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes;" in order to establish justice, promote the welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the following constitution or form of government; and do mutually agree with each other to form ourselves into a free and independent state, by the name of the State of Ohio.

ARTICLE I.

OF THE LEGISLATIVE POWER.

SECTION 1. The legislative authority of this state shall be vested in a GENERAL ASSEMBLY, which shall consist of a senate and house of representatives, both to be elected by the people.

SECT. 2. Within one year after the first meeting of the general assembly, and within every subsequent term of four years, an enumeration of all the white male inhabitants, above twenty-one years of age, shall be made in such manner as shall be directed by law. The number of representatives shall, at the several periods of making such enumeration, be fixed by the legislature and apportioned among the several counties, according to the number of white male inhabitants above twenty-one years of age in each, and shall never be less than twenty-four, nor greater than thirty-six, until the number of white male inhabitants, above twenty-one years of age, shall be twenty-two thousand; and after that event, at such ratio that the whole number of representatives shall never be less than thirty-six, nor exceed seventy-two.

SECT. 3. The representatives shall be chosen annually, by the citizens of each county, respectively, on the second Tuesday of October.

SECT. 4. No person shall be a representative, who shall not have attained the age of twenty-five years, and be a citizen of the United States, and an inhabitant of this state; shall also have resided within the limits of the county in which he shall be chosen, one year next preceding his election, unless he shall have been absent on the public business of the United States, or of this state, and shall have paid a state or county tax.

SECT. 5. The senators shall be chosen biennially, by the qualified voters for representatives; and on their being convened in consequence of the first election, they shall be divided, by lot, from their respective counties or districts, as near as can be, into two classes: the seats of the senators of the first class shall be vacated at the expiration of the first year, and of the second class at the expiration of the second year; so that one half thereof, as near as possible, may be annually chosen for ever thereafter.

SECT. 6. The number of senators shall, at the several periods of making the enumeration, before mentioned, be fixed by the legislature, and apportioned among the several counties or districts, to be established by law, according to the number of white male inhabitants of the age of twenty-one years in each, and shall never be less than one third, nor more than one half, of the number of representatives.

SECT. 7. No person shall be a senator who has not arrived at the age of thirty years, and is a citizen of the United States; shall have resided two years in the county or district, immediately preceding the election, unless he shall have been absent on the public business of the United States, or of this state; and shall, moreover, have paid a state or county tax.

SECT. 8. The senate and house of representatives, when assembled, shall each choose a speaker, and its other officers; be judges of the qualifications and elections of its members, and sit upon its own adjournments; two thirds of each house shall constitute a quorum to do

business; but a smaller number may adjourn from day to day, and compel the attendance of absent members.

SECT. 9. Each house shall keep a journal of its proceedings, and publish them: the yeas and nays of the members, on any question, shall, at the desire of any two of them, be entered on the journals.

SECT. 10. Any two members of either house shall have liberty to dissent from, and protest against, any act or resolution which they may think injurious to the public or any individual, and have the reasons of their dissent entered on the journals.

SECT. 11. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free and independent state.

SECT. 12. When vacancies happen in either house, the governor, or the person exercising the power of the governor, shall issue writs of election to fill such vacancies.

SECT. 13. Senators and representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during the session of the general assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

SECT. 14. Each house may punish, by imprisonment, during their session, any person not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in their presence; provided such imprisonment shall not, at any one time, exceed twenty-four hours.

SECT. 15. The doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the two houses shall be sitting.

SECT. 16. Bills may originate in either house, but may be altered, amended or rejected by the other.

SECT. 17. Every bill shall be read on three different days in each house, unless, in case of urgency, three fourths of the house where such bill is so depending, shall deem it expedient to dispense with this rule: and every bill having passed both houses, shall be signed by the speakers of their respective houses.

SECT. 18. The style of the laws of this state shall be—"Be it enacted by the General Assembly of the State of Ohio."

SECT. 19. The legislature of this state shall not allow the following officers of government greater annual salaries than as follows, until the year one thousand eight hundred and eight, to wit:—the governor, not more than one thousand dollars; the judges of the supreme court, not more than one thousand dollars each; the presidents of the courts of common pleas, not more than eight hundred dollars each; the secretary of state, not more than five hundred dollars; the auditor of public accounts, not more than seven hundred and fifty dollars; the treasurer, not more than four hundred and fifty dollars: no member of the legislature shall receive more than two dollars per day, during his attendance

on the legislature, nor more for every twenty-five miles he shall travel in going to, and returning from, the general assembly.

SECT. 20. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased, during such time.

SECT. 21. No money shall be drawn from the treasury, but in consequence of appropriations made by law.

SECT. 22. An accurate statement of the receipts and expenditures of the public money shall be attached to, and published with the laws, annually.

SECT. 23. The house of representatives shall have the sole power of impeaching, but a majority of all the members must concur in an impeachment: all impeachments shall be tried by the senate; and when sitting for that purpose, the senators shall be upon oath or affirmation, to do justice according to law and evidence: no person shall be convicted without the concurrence of two thirds of all the senators.

SECT. 24. The governor, and all other civil officers under this state, shall be liable to impeachment for any misdemeanor in office; but judgment in such case shall not extend further than removal from office, and disqualification to hold any office of honor, profit or trust under this state. The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment and punishment, according to law.

SECT. 25. The first session of the general assembly shall commence on the first Tuesday of March next; and for ever after, the general assembly shall meet on the first Monday of December, in every year, and at no other period, unless directed by law, or provided for by this constitution.

SECT. 26. No judge of any court of law or equity, secretary of state, attorney general, register, clerk of any court of record, sheriff or collector, member of either house of congress, or person holding any office under the authority of the United States, or any lucrative office under the authority of this state, (provided that appointments in the militia or justices of the peace, shall not be considered lucrative offices,) shall be eligible as a candidate for, or have a seat in, the general assembly.

SECT. 27. No person shall be appointed to any office within any county, who shall not have been a citizen and inhabitant therein, one year next before his appointment, if the county shall have been so long erected, but if the county shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken.

SECT. 28. No person who heretofore hath been, or hereafter may be, a collector or holder of public moneys, shall have a seat in either house of the general assembly, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable or liable.

ARTICLE II.

OF THE EXECUTIVE.

SECT. 1. The supreme executive power of this state shall be vested in a GOVERNOR.

SECT. 2. The governor shall be chosen by the electors of the members of the general assembly, on the second Tuesday of October, at the same places, and in the same manner, that they shall respectively vote for the members thereof. The returns of every election for governor, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the speaker of the senate, who shall open and publish them, in the presence of a majority of the members of each house of the general assembly: the person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by joint ballot of both houses of the general assembly. Contested elections for governor, shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

SECT. 3. The first governor shall hold his office until the first Monday of December, one thousand eight hundred and five, and until another governor shall be elected and qualified to office; and for ever after, the governor shall hold his office for the term of two years, and until another governor shall be elected and qualified; but he shall not be eligible more than six years, in any term of eight years. He shall be at least thirty years of age, and have been a citizen of the United States twelve years, and an inhabitant of this state four years next preceding his election.

SECT. 4. He shall, from time to time, give to the general assembly information of the state of the government, and recommend to their consideration such measures as he shall deem expedient.

SECT. 5. He shall have the power to grant reprieves and pardons, after conviction, except in cases of impeachment.

SECT. 6. The governor shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the term for which he shall have been elected.

SECT. 7. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed.

SECT. 8. When any officer, the right of whose appointment is, by this constitution, vested in the general assembly, shall, during the recess, die, or his office by any means become vacant, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the legislature.

SECT. 9. He may, on extraordinary occasions, convene the general assembly, by proclamation, and shall state to them, when assembled, the purposes for which they have been convened.

SECT. 10. He shall be commander-in-chief of the army and navy of this state, and of the militia, except when they shall be called into the service of the United States.

SECT. 11. In case of disagreement between the two houses, with respect to the time of adjournment, the governor shall have the power to adjourn the general assembly to such time as he thinks proper: provided it be not a period beyond the annual meeting of the legislature.

SECT. 12. In case of the death, impeachment, resignation or removal of the governor from office, the speaker of the senate shall exercise the office of governor, until he be acquitted, or another governor shall be

duly qualified. In case of the impeachment of the speaker of the senate, or his death, removal from office, resignation or absence from the state, the speaker of the house of representatives shall succeed to the office, and exercise the duties thereof, until a governor shall be elected and qualified.

SECT. 13. No member of congress, or person holding any office under the United States, or this state, shall execute the office of governor.

SECT. 14. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called "THE GREAT SEAL OF THE STATE OF OHIO."

SECT. 15. All grants and commissions shall be in the name, and by the authority of the state of Ohio, sealed with the seal, signed by the governor, and countersigned by the secretary.

SECRETARY OF STATE.

SECT. 16. A secretary of state shall be appointed by a joint ballot of the senate and house of representatives, who shall continue in office three years, if he shall so long behave himself well: he shall keep a fair register of all the official acts and proceedings of the governor; and shall, when required, lay the same, and all papers, minutes and vouchers relative thereto, before either branch of the legislature; and shall perform such other duties as shall be assigned him by law.

ARTICLE III.

OF THE JUDICIARY.

SECT. 1. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the legislature may, from time to time, establish.

SECT. 2. The supreme court shall consist of three judges, any two of whom shall be a quorum. They shall have original and appellate jurisdiction, both in common law and chancery, in such cases as shall be directed by law; provided, that nothing herein contained shall prevent the general assembly from adding another judge to the supreme court after the term of five years, in which case the judges may divide the state into two circuits, within which any two of the judges may hold a court.

SECT. 3. The several courts of common pleas, shall consist of a president and associate judges. The state shall be divided, by law, into three circuits: there shall be appointed in each circuit a president of the courts, who, during his continuance in office, shall reside therein. There shall be appointed in each county, not more than three nor less than two associate judges, who, during their continuance in office, shall reside therein. The president and associate judges, in their respective counties, any three of whom shall be a quorum, shall compose the court of common pleas; which court shall have common law and chancery jurisdiction in all such cases as shall be directed by law: provided, that nothing herein contained shall be construed to prevent the legislature

from increasing the number of circuits and presidents, after the term of five years.

SECT. 4. The judges of the supreme court and courts of common pleas, shall have complete criminal jurisdiction in such cases and in such manner, as may be pointed out by law.*

SECT. 5. The court of common pleas in each county, shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law.†

SECT. 6. The judges of the court of common pleas, shall, within their respective counties, have the same powers with the judges of the supreme court, to issue writs of certiorari to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done.

SECT. 7. The judges of the supreme court shall, by virtue of their offices, be conservators of the peace throughout the state. The presidents of the courts of common pleas shall, by virtue of their offices, be conservators of the peace in their respective circuits; and the judges of the court of common pleas shall, by virtue of their offices, be conservators of the peace in their respective counties.

SECT. 8. The judges of the supreme court, the presidents and the associate judges of the courts of common pleas, shall be appointed by a joint ballot of both houses of the general assembly, and shall hold their offices for the term of seven years, if so long they behave well. The judges of the supreme court, and the presidents of the courts of common pleas, shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the authority of this state or the United States.

SECT. 9. Each court shall appoint its own clerk for the term of seven years; but no person shall be appointed clerk, except pro tempore, who shall not produce to the court, appointing him, a certificate from a majority of the judges of the supreme court, that they judge him to be well qualified to execute the duties of the office of clerk to any court of the same dignity with that for which he offers himself. They shall be removable for breach of good behavior, at any time, by the judges of the respective courts.

SECT. 10. The supreme court shall be held once a year, in each county, and the courts of common pleas shall be holden in each county, at such times and places as shall be prescribed by law.

SECT. 11. A competent number of justices of the peace shall be elected by the qualified electors in each township in the several counties, and shall continue in office three years, whose powers and duties shall, from time to time, be regulated and defined by law.

SECT. 12. The style of all process shall be, "The State of Ohio:" all prosecutions shall be carried on in the name and by the authority of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the same."

* Wright's Rep. 32.

† 7 O. R. part 2, 138.

ARTICLE IV.

OF ELECTIONS AND ELECTORS.

SECT. 1. In all elections, all white male inhabitants above the age of twenty-one years, having resided in the state one year next preceding the election, and who have paid or are charged with a state or county tax, shall enjoy the right of an elector; but no person shall be entitled to vote, except in the county or district in which he shall actually reside at the time of the election.

SECT. 2. All elections shall be by ballot.

SECT. 3. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest, during their attendance at elections, and in going to and returning from the same.

SECT. 4. The legislature shall have full power to exclude from the privilege of electing, or being elected, any person convicted of bribery, perjury, or any other infamous crime.

SECT. 5. Nothing contained in this article shall be so construed as to prevent white male persons, above the age of twenty-one years, who are compelled to labor on the roads of their respective townships or counties, and who have resided one year in the state, from having the right of an elector.

ARTICLE V.

OF THE MILITIA OFFICERS.

SECT. 1. Captains and subalterns in the militia, shall be elected by those persons, in their respective company districts, subject to military duty.

SECT. 2. Majors shall be elected by the captains and subalterns of the battalion.

SECT. 3. Colonels shall be elected by the majors, captains, and subalterns of the regiment.

SECT. 4. Brigadiers general shall be elected by the commissioned officers of their respective brigades.

SECT. 5. Majors general and quartermasters general shall be appointed by joint ballot of both houses of the legislature.

SECT. 6. The governor shall appoint the adjutant general. The majors general shall appoint their aids and other division staff officers. The brigadiers general shall appoint their brigade majors and other brigade staff officers. The commanding officers of regiments shall appoint their adjutants, quartermasters and other regimental staff officers; and the captains and subalterns shall appoint their non-commissioned officers and musicians.

SECT. 7. The captains and subalterns of the artillery and cavalry, shall be elected by the persons enrolled in their respective corps; and the majors and colonels shall be appointed in such manner as shall be directed by law. The colonels shall appoint their regimental staff; and the captains and subalterns their non-commissioned officers and musicians.

ARTICLE VI.

OF CIVIL OFFICERS.

SECT. 1. There shall be elected in each county, one sheriff and one coroner, by the citizens thereof, who are qualified to vote for members of the assembly: they shall be elected at the time and place of holding elections for members of assembly: they shall continue in office two years, if they shall so long behave well, and until successors be chosen and duly qualified: provided, that no person shall be eligible as sheriff for a longer term than four years in any term of six years.

SECT. 2. The state treasurer and auditor shall be triennially appointed by a joint ballot of both houses of the legislature.

SECT. 3. All town and township officers shall be chosen annually, by the inhabitants thereof, duly qualified to vote for members of assembly, at such time and place as may be directed by law.

SECT. 4. The appointment of all civil officers, not otherwise directed by this constitution, shall be made in such manner as may be directed by law.

ARTICLE VII.

OFFICIAL OATHS.

SECT. 1. Every person who shall be chosen or appointed to any office of trust or profit, under the authority of this state, shall, before the entering on the execution thereof, take an oath or affirmation to support the constitution of the United States and of this state, and also an oath of office.

BRIBERY AT ELECTIONS.

SECT. 2. Any elector, who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the laws shall direct; and any person who shall, directly or indirectly, give, promise, or bestow any such reward, to be elected, shall thereby be rendered incapable, for two years, to serve in the office for which he was elected, and be subject to such other punishment as shall be directed by law.

OF NEW COUNTIES.

SECT. 3. No new county shall be established by the general assembly, which shall reduce the county or counties, or either of them, from which it shall be taken, to less contents than four hundred square miles; nor shall any county be laid off, of less contents. Every new county, as to the right of suffrage and representation, shall be considered as a part of the county or counties from which it was taken, until entitled, by numbers, to the right of representation.

OF THE SEAT OF GOVERNMENT.

SECT. 4. Chillicothe shall be the seat of government until the year one thousand eight hundred and eight. No money shall be raised until the year one thousand eight hundred and nine, by the legislature of this state, for the purpose of erecting public buildings for the accommodation of the legislature.

OF AMENDMENTS TO THE CONSTITUTION.

SECT. 5. That after the year one thousand eight hundred and six, whenever two thirds of the general assembly shall think it necessary to amend or change this constitution, they shall recommend to the electors, at the next election for members to the general assembly, to vote for or against a convention; and if it shall appear that a majority of the citizens of the state, voting for representatives, have voted for a convention, the general assembly shall, at their next session, call a convention, to consist of as many members as there be in the general assembly; to be chosen in the same manner, at the same place, and by the same electors that choose the general assembly; who shall meet within three months after the said election, for the purpose of revising, amending or changing the constitution. But no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state.

BOUNDARIES OF THE STATE.

SECT. 6. That the limits and boundaries of this state be ascertained, it is declared, that they are as hereafter mentioned; that is to say: bounded on the east by the Pennsylvania line; on the south by the Ohio river to the mouth of the Great Miami river; on the west by the line drawn due north from the mouth of the Great Miami, aforesaid; and on the north by an east and west line drawn through the southerly extreme of Lake Michigan, running east, after intersecting the due north line aforesaid, from the mouth of the Great Miami until it shall intersect Lake Erie or the territorial line, and thence with the same, through Lake Erie, to the Pennsylvania line aforesaid; provided always, and it is hereby fully understood and declared by this convention, that if the southerly bend or extreme of Lake Michigan should extend so far south, that a line drawn due east from it shall not intersect Lake Erie, or if it should intersect the said Lake Erie east of the mouth of the Miami river of the Lake, then and in that case, with the assent of the congress of the United States, the northern boundary of this state shall be established by, and extended to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay, after intersecting the due north line from the mouth of the Great Miami river as aforesaid, thence northeast to the territorial line, and, by the said territorial line, to the Pennsylvania line.

ARTICLE VIII.

BILL OF RIGHTS.

That the general, great, and essential principles of liberty and free government may be recognized and for ever unalterably established, we declare,

SECT. 1. That all men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence: to effect these ends, they

have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary.

SECT. 2. There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration received, or to be received, for their service, except as before excepted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the state, or if made in the state, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.

SECT. 3. That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience; * that no man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given, by law, to any religious society or mode of worship, and no religious test shall be required, as a qualification, to any office of trust or profit. But religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall for ever be encouraged by legislative provision, not inconsistent with the rights of conscience.

SECT. 4. Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner. †

SECT. 5. That the people shall be secure in their persons, houses, papers and possessions, from unwarrantable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without probable evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described, and without oath or affirmation, are dangerous to liberty, and shall not be granted.

SECT. 6. That the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of government, or the conduct of any public officer; and no law shall ever restrain the right thereof. Every citizen has an undisputable right to speak, write or print, upon any subject, as he thinks proper, being liable for the abuse of that liberty. In prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information, the truth thereof may always be given in evidence; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

* Wright's Rep. 323.

† 4 O. R. 288, 253, 427; 5 O. R. 118, 139, 391, 485; Wright's Rep. 132; 7 O. R. part 2, 111.

SECT. 7. That all courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay.

SECT. 8. That the right of trial by jury shall be inviolate.*

SECT. 9. That no power of suspending laws shall be exercised, unless by the legislature.

SECT. 10. That no person, arrested or confined in jail, shall be treated with unnecessary rigor, or be put to answer any criminal charge, but by presentment, indictment or impeachment.

SECT. 11. That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county or district in which the offence shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offence.†

SECT. 12. That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it.

SECT. 13. Excessive bail shall not be required; excessive fines shall not be imposed; nor cruel and unusual punishments inflicted.

SECT. 14. All penalties shall be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crime of theft, forgery and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant, with as little compunction as they do the slightest offences. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust: the true design of all punishments being to reform, not to exterminate, mankind.

SECT. 15. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.

SECT. 16. No ex post facto law, nor any law impairing the validity of contracts, shall ever be made;‡ and no conviction shall work corruption of blood, or forfeiture of estate.§

SECT. 17. That no person shall be liable to be transported out of this state, for any offence committed within the state.

SECT. 18. That a frequent recurrence to the fundamental principles of civil government, is absolutely necessary to preserve the blessings of liberty.

* 7 O. R. part 2, 111; 5 O. R. 485, 118, 133; 4 O. R. 253.

† 6 O. R. 399.

‡ 2 O. R. 65; 4 O. R. 427; 5 O. R. 133; 7 O. R. part 1, 125.

§ 5 O. R. 28.

SECT. 19. That the people have a right to assemble together, in a peaceable manner, to consult for their common good, to instruct their representatives, and to apply to the legislature for a redress of grievances.

SECT. 20. That the people have a right to bear arms for the defence of themselves and the state: and as standing armies in time of peace, are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power.*

SECT. 21. That no person in this state, except such as are employed in the army or navy of the United States, or militia in actual service, shall be subject to corporal punishment under the military law.

SECT. 22. That no soldier, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in the manner prescribed by law.

SECT. 23. That the levying taxes by the poll is grievous and oppressive; therefore, the legislature shall never levy a poll tax for county or state purposes.†

SECT. 24. That no hereditary emoluments, privileges or honors, shall ever be granted or conferred by this state.

SECT. 25. That no law shall be passed to prevent the poor in the several counties and townships within this state from an equal participation in the schools, academies, colleges and universities within this state, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges; and the doors of the said schools, academies and universities, shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made.

SECT. 26. That laws shall be passed by the legislature, which shall secure to each and every denomination of religious societies, in each surveyed township which now is, or may hereafter be formed in the state, an equal participation, according to their number of adherents, of the profits arising from the land granted by congress, for the support of religion, agreeably to the ordinance or act of congress, making the appropriation.

SECT. 27. That every association of persons, when regularly formed, within this state, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and for other purposes.

SECT. 28. To guard against the transgression of the high powers, which we have delegated, we declare, that all powers, not hereby delegated, remain with the people.

SCHEDULE.

SECT. 1. That no evils or inconveniencies may arise, from the change of a territorial government to a permanent state government, it is declared by this convention, that all rights, suits, actions, prosecutions, claims and contracts, both as it respects individuals and bodies corporate, shall continue, as if no change had taken place in this government.

* Wright's Rep. 421.

† 5 O. R. 14; 3 O. R. 63.

2. All fines, penalties and forfeitures, due and owing to the United States, northwest of the river Ohio, shall inure to the state. All bonds executed to the governor, or any other official capacity, in the territory, shall pass over to the other officers of the state, and their successors in office, or by him or them to be respectively assigned to the use of those concerned, as the case may be.
 3. The governor, secretary and judges, and all other officers of the territorial government, shall continue in the exercise of their respective departments, until the said officers are superseded by the authority of this constitution.
 4. All laws, and parts of laws, now in force in this territory, consistent with this constitution, shall continue and remain in full force and effect, until repealed by the legislature, except so much of the act, entitled "an act regulating the admission and practice of attorneys and judges at law," and of the act made amendatory thereto, as relates to the term of time which the applicant shall have studied law, his residence in the territory, and the term of time which he shall have as an attorney at law, before he can be admitted to the degree of attorney at law.
 5. The governor of the state shall make use of his private seal.
 6. The president of the convention, shall issue writs of election to the several counties, requiring them to proceed to hold a general election in each county, on the second day of January next; which elections shall be conducted in the manner prescribed by the existing laws of this territory: and the members of the general assembly, sheriffs and clerks of the several counties, shall issue writs of election to the several counties, requiring them to proceed to hold a general election in each county, on the second day of January next; which elections shall be conducted in the manner prescribed by the existing laws of this territory: and the members of the general assembly, then elected, shall continue to exercise their respective offices until the next annual or biennial election, as prescribed in this constitution, and no longer.
 7. Until the first enumeration shall be made, as directed in the constitution of the first article of this constitution, the county of Hamilton shall be entitled to four senators and eight representatives; the county of Adams, one senator and two representatives; the county of Ross, two senators and three representatives; the county of Fairfield, one senator and two representatives; the county of Washington, two senators and three representatives; the county of Belmont, one senator and two representatives; the county of Jefferson, two senators and four representatives; the county of Trumbull, one senator and two representatives.
- in convention, at Chillicothe, the twenty-ninth day of November, the year of our Lord one thousand eight hundred and two, and of the independence of the United States of America, the twenty-seventh.

No. VI. CATALOGUE OF A SELECT LAW LIBRARY, AND LIST OF AMERICAN AND ENGLISH REPORTS.

1. CATALOGUE OF A SELECT LAW LIBRARY, EXCLUSIVE OF REPORTS.

PART I. PRELIMINARY STUDIES.

Elementary.

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|--|--|
| Walker's Introduction to American Law. | Wooddeson's Lectures. |
| Sullivan's Lectures. | |
| Blackstone's Commentaries. | Warren's Introduction to Law Studies. |
| Kent's Commentaries. | |
| Swift's Digest. | Wright's Advice on the Study of the Law. |
| Hoffman's Course of Legal Study. | |
| Hoffman's Legal Outlines. | Montesquieu's Spirit of Laws. |
| Wilson's Lectures. | Bentham on Legislation. |

Historical.

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| Crabbe's History of the English Law. | Bradford's History of the Federal Government. |
| Reeves' History of the English Law. | Bancroft's History of the United States. |
| Hale's History of the Common Law. | |
| Spence's Inquiry into the Origin of Laws. | Hallam's Constitutional History. |
| | Hume's History of England. |
| Pitkin's History of the United States. | Gibbon's History of the Roman Empire. |

Auxiliary.

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|---------------------------|---------------------------------------|
| Bouvier's Law Dictionary. | Termes de la Ley. |
| Jacob's Law Dictionary. | Kelham's Dictionary of Norman French. |
| Tomlins' Law Dictionary. | |
| Tayler's Law Glossary. | Encyclopedia Americana. |

PART II. CONSTITUTIONAL LAW.

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|--|--|
| American Constitutions. | Rawle on the Constitution. |
| Story's Commentaries on the Constitution. | Sergeant on the Jurisdiction and Practice of the United States Courts. |
| Madison Papers. | |
| Federalist. | Du Ponceau on the Jurisdiction of the United States Courts. |
| Elliot's Debates in the State Conventions. | De Lolme on the English Constitution. |
| Marshall's Writings on the Federal Constitution. | |

PART. III. LAW OF PERSONS.

Corporations.

Angell and Ames on Corporations. Wilcock on Municipal Corporations.
Kyd on Corporations.

Partnership.

Story on Partnership. Cary on Partnership.
Collyer on Partnership. Montagu on Partnership.
Gow on Partnership.

Husband and Wife.

Clancy on Husband and Wife. Atherly on Marriage Settlements.
Roper on Husband and Wife. Reeve's Domestic Relations.
Bingham on Coverture. Woman's Lawyer.
Poynter on Marriage and Divorce.

Parent and Child.

Bingham on Infancy. Macpherson on Infancy.

Guardian and Ward.

Collinson on Idiots and Lunatics. Pritchard on Insanity.
Shelford on Lunatics. Halsam on Insanity.
Highmore on Lunacy. Beck's Medical Jurisprudence.
Stock on Non Compos Mentis. Ray's Medical Jurisprudence.
Burrows on Insanity. Chitty's Medical Jurisprudence.

Master and Servant.

Story on Agency. Livermore on Principal and Agent.
Paley on Agency.

Executors and Administrators.

Lomax on Executors and Administrators. Williams on Executors.
Toller on Executors. Wentworth on Executors.

PART IV. LAW OF REAL PROPERTY.

General.

Hilliard's Digest. Humphrey on Real Property.
Lomax's Digest. Sullivan on Land Titles.
Cruise's Digest. Burton's Compendium.
Flintoff on Real Property. Woodfall's Landlord and Tenant.
Preston on Estates. Park on Dower.
Wright on Tenures. Fearne on Remainders.
Gilbert on Tenures. Fearne on Executory Devises.
Coke upon Littleton. Angell on Adverse Enjoyment.
Sheppard's Touchstone.

Incorporeal Hereditaments, Easements and Fixtures.

Woolrych on Ways. Angell on Tide Waters.
Gale and Whatley on Easements. Woolrych on Window Lights,
Gilbert on Rents. Amos on Fixtures.
Angell on Water Courses.

Mortgages.

Powell on Mortgages, by Rand. Patch on Mortgages.
Coote on Mortgages.

Equitable Estates.

Sanders on Uses and Trusts. Willis on Trustees.
Bacon on Uses. Lewin on Trusts.
Cornish on Uses. Sugden on Powers.
Duke on Charitable Uses. Powell on Powers.
Fletcher on Estates of Trustees. Chance on Powers.
Thompson on Trustees.

Title by Descent.

Reeve on Descents. Chitty on Descents.
Watkins on Descents.

Title by Devise.

Powell on Devises. Ram on Wills.
Jarman on Wills. Wigram on Wills.
Roberts on Wills. Hayes on Limitations in Devises.

Title by Purchase.

Curtis' American Conveyancer. Wood on Conveyancing.
Oliver on Conveyancing. Roberts on Fraudulent Conveyances.
Barton on Conveyancing. Sugden on Vendors.
Watkins on Conveyancing.

PART V. PERSONAL PROPERTY AND CONTRACTS.

General.

Chitty on Contracts. Newland on Equity Contracts.
Story on Contracts. Pothier on Obligations.
Comyn on Contracts. Platt on Covenants.
Powell on Contracts. Hurlstone on Bonds.
Chipman on Contracts. Angell on Assignments.
Verplank on Contracts.

Negotiable Contracts.

Story on Bills. Kyd on Bills.
Bayley on Bills. Cunningham on Exchange.
Chitty on Bills. Roscoe on Exchange.

Sales.

Long on Sales, by Rand. Roberts on Frauds.
Pothier on Sales, by Cushing. Hovenden on Frauds.
Ross on Vendors.

Bailments.

Story on Bailments. Jones on Carriers.
Jones on Bailments. Cobbett on Pawns.
Jeremy on Carriers.

Principal and Surety.

Theobald on Principal and Surety. Pitman on Principal and Surety.
Fell on Guaranty.

Insurance.

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| Phillips on Insurance. | Benecke and Stevens on Average, |
| Marshall on Insurance. | by Phillips. |
| Millar on Insurance. | Park on Insurance. |
| Hughes on Insurance. | Weskett on Insurance. |

Maritime Contracts.

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| Abbott on Shipping, by Story. | Pothier on Maritime Contracts. |
| Holt on Shipping. | Lawes on Charter Parties. |
| Reeves on Shipping. | |

Miscellaneous.

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| Montagu on Lien. | Robertson on Personal Succession. |
| Cross on Lien. | Smith on Joint Interests. |
| Curtis on Merchant Seamen. | Phillips on Patents. |
| Chitty's Commercial Law. | Godson on Patents. |
| Smith's Commercial Law. | Webster on Patents. |
| Caine's Lex Mercatoria Americana. | Deacon on Bankruptcy. |
| Ellis on Debtor and Creditor. | Owen on Bankruptcy. |
| Roper on Legacies. | |

PART VI. COMMON LAW PROCEDURE.

Practice.

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|-----------------------------------|------------------------------------|
| Tidd's Practice. | Troubat and Haly's Practice in |
| Chitty's Practice. | Pennsylvania. |
| Conkling's Practice in the U. S. | Robinson's Practice in Virginia. |
| Courts. | Wilcox's Ohio Forms. |
| Stephens' Nisi Prius. | Dunlap's Admiralty Practice. |
| Leigh's Nisi Prius. | Clerke's Admiralty Practice. |
| Selwyn's Nisi Prius, by Wheaton. | Hall's Admiralty Practice. |
| Butler's Nisi Prius. | Adams on Ejectment, by Tillinghast |
| Hammond's Nisi Prius. | Runninton on Ejectment. |
| Espinasse's Nisi Prius. | Jackson on Real Actions. |
| Roscoe's Nisi Prius. | Roscoe on Real Actions. |
| Hammond on Parties. | Stearns on Real Actions. |
| Howe's Practice in Massachusetts. | Booth on Real Actions. |
| Paine and Duer's Practice in New | Alnatt on Partition. |
| York. | |

Pleading.

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|---------------------------------|------------------------------------|
| Stephen on Pleading. | Saunders on Pleading and Evidence. |
| Story on Pleading. | Saunders' Reports, with Notes. |
| Chitty on Pleading. | Wentworth on Pleading. |
| Gould on Pleading. | Lilly's Entries. |
| Lawes on Pleading in Assumpsit. | |

Evidence.

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|--------------------------------|-----------------------------------|
| Greenleaf on Evidence. | Gilbert on Evidence. |
| Roscoe on Evidence. | Matthew on Presumptions. |
| Starkie on Evidence. | Peake on Evidence, by Norris. |
| Phillips on Evidence, by Cowen | Swift's Evidence. |
| and Hill. | Wells on Circumstantial Evidence. |

Miscellaneous.

Kitchen on Courts.	Wilkinson on Limitations.
Caldwell on Arbitrations.	Barbour on Set-off.
Watson on Arbitrations.	Babington on Set-off.
Kyd on Awards.	Montagu on Set-off.
Bradly on Distresses.	Wilkinson on Replevin.
Gilbert on Distresses.	Watson's Sheriff.
Sergeant on Attachment.	Dalton's Sheriff.
Ashley on Attachment.	Sheppard's Constable.
Cushing on Trustee Process.	Swan's Justice and Constable.
Starkie on Slander.	Gilbert on Executions.
Angell on Limitations.	Bingham on Judgments and Execu- tions.
Blanshard on Limitations.	

PART VII. CHANCERY LAW AND PROCEDURE.

Principles.

Story on Equity Jurisprudence.	Drewry on Injunctions.
Fonblanque on Equity.	Wigram on Discovery.
Jeremy on Equity.	Hare on Discovery.
Maddock's Chancery.	Boyle on Chariues.
Eden on Injunctions.	

Practice and Pleading.

Story on Equity Pleading.	Welford's Equity Pleadings.
Gresley's Equity Evidence.	Hoffman's Chancery Practice.
Mitford on Equity Pleadings.	Hoffman's Master in Chancery.
Cooper on Equity Pleadings.	Blake's Chancery.
Barton's Suit in Equity.	Farren's Common Forms.
Daniel's Chancery Practice.	Beames' Pleas in Equity.
Redesdale on Pleading.	Grant's Chancery Practice.
Smith's Chancery Practice.	Hand's Solicitor in Chancery.
Bennett's Practice in the Master's Office.	Harrison's Chancery Practice.
Newland's Chancery Practice.	Hinde's Chancery Practice.
Seton's Forms of Decrees.	Montague on Equity Pleadings.
	Robinson's Practice.

PART VIII. CRIMES AND CRIMINAL PROCEDURE.

Chitty's Criminal Law.	Deacon's Criminal Law.
Russell on Crimes.	Hale's Pleas of the Crown.
Archbold's Criminal Pleading.	Hawkins' Pleas of the Crown.
Starkie's Criminal Pleading.	Foster's Crown Law.
Davis' Precedents.	Gabbett's Criminal Law.
Roscoe's Criminal Evidence.	Holt's Law of Libel.
Beccaria on Crimes.	McNally's Criminal Evidence.
East's Pleas of the Crown.	Burn's Justice.

PART IX. INTERNATIONAL LAW.

Wheaton on International Law.	Puffendorf on the Law of Nations.
Story on the Conflict of Laws.	Ward on the Law of Nations.

Rutherforth's Institutes.	Reddie on International Law.
Burlamaqui on the Law of Nature and Nations.	Martens on the Law of Nations.
Bynkershoek on War.	Mackintosh on National Law.
Grotius on the Law of Nations.	Wheaton on Captures.
Vattel on the Law of Nations.	Chitty on Captures.
	Lee on Captures.

PART X. CIVIL AND CANON LAW.

Justinian's Institutes, by Cooper.	Civil Code of Louisiana.
Domat on the Civil Law, by Strahan.	Code of Procedure of Louisiana.
Irving's Introduction to the Civil Law.	Halifax on Roman and Civil Law.
Ayliffe's Pandects.	Butler's <i>Honae Juridicae</i> .
Brown's Civil and Admiralty Law.	Brown's Ecclesiastical Law.
	Rogers' Ecclesiastical Law.

PART XI. ABRIDGMENTS AND DIGESTS.

General.

Comyn's Digest.	Harrison's Index to Modern Common Law.
Dane's Abridgment.	
Petersdorff's Abridgment.	Wheeler's Digest of American Common Law.
Bacon's Abridgment.	
Chitty's English Chancery Digest.	Tomlins' Index to Criminal Law.
Wheeler's Am. Chancery Digest.	Viner's Abridgment.
Coventry and Hughes' Index to Old Common Law.	Rolle's Abridgment.

Particular Courts and States.

Peters' Digest of Decisions in the U. S. Courts.	Connecticut Reports, by Dutton.
Metcalf and Perkins' Digest of American Decisions.	Maine Reports, by Greenleaf.
Curtis' Digest of Admiralty Decisions.	Virginia Reports, by Hall, and by Munford.
Maddy's Digest of Ecclesiastical Reports.	New Jersey Reports, by Halsted.
Massachusetts Reports, by Minot, and by Bigelow.	North Carolina Reports, by Iredell.
New York Reports, by Clarke, Johnson, Cowen, and Wendell.	South Carolina Reports, by Rice.
Pennsylvania Reports, by Wharton.	Alabama Reports, by Dorsey.
	Louisiana Reports, by Benjamin and Slidell, and by Christy.
	Indiana and Illinois Reports, by Gilman.

2. LIST OF AMERICAN REPORTS, IN THE ORDER OF THE SEVERAL COURTS AND STATES.

UNITED STATES.

1. SUPREME COURT.

Dallas's Reports.	From August term, 1790, to August term, 1800.
	4 vols.
Cranch's Reports.	From 1800, to February term, 1815. 9 vols.

Wheaton's Reports. From February term, 1816, to January term, 1827, inclusive. 12 vols.

Peters's Reports. From 1827 to 1843. 17 vols.

Peters's Condensed Reports of Cases in the Supreme Court of the United States. 6 vols.

Howard's Reports. From 1843. 2 vols.

2. CIRCUIT COURT.—*First Circuit.*

Gallison's Reports. From 1812 to 1815, inclusive. 2 vols.

Mason's Reports. From 1816 to 1830, inclusive. 5 vols.

Sumner's Reports. From 1830 to 1839. 3 vols.

Story's Reports. From 1839 to 1841. 1 vol.

Second Circuit.

Paine's Reports. From 1810 to 1827. 1 vol.

Third Circuit.

Dallas's Reports. [The 2d, 3d and 4th volumes contain cases decided in this Court, from April term, 1792, to October term, 1806, inclusive.]

Washington's C. C. Reports. From 1803 to 1827. 4 vols.

Peters's C. C. Reports. From 1803 to 1818. 1 vol.

Baldwin's Reports. From October term, 1829, to April term, 1833, inclusive. 1 vol.

Wallace's Reports, include the cases of May sessions, 1801. 1 vol.

Fourth Circuit.

Brockenbrough's Reports of Marshall's Decisions. From 1802 to 1832. 2 vols.

Seventh Circuit.

McLean's Reports. From 1829 to 1843. 2 vols.

3. DISTRICT COURTS.—*District of Maine.*

Ware's Reports. From 1822 to 1839. 1 vol.

District of New York.

Van Ness's Reports. 1 vol.

District of Pennsylvania.

Peter's Admiralty Decisions. From 1792 to 1807. 2 vols.

Eastern District of Pennsylvania.

Gilpin's Reports. From November term, 1828, to February term, 1836, inclusive. 1 vol.

District of South Carolina.

Bee's Admiralty Reports. From 1792 to 1805. 1 vol.

STATE REPORTS.

Maine.

- Greenleaf's Reports. From 1820 to 1832. 9 vols.
 Fairfield's Reports. From 1833 to 1835. 3 vols.
 Shepley's Reports. From April term, 1836, to June term, 1841. 6 vols.
 Appleton's Reports. From 1841. 1 vol.

New Hampshire.

- New Hampshire Reports. From 1816 to 1843 9 vols.

Vermont.

- N. Chipman's Reports. From 1789 to 1791. 1 vol.
 Tyler's Reports. From 1801 to 1803. 2 vols.
 Brayton's Reports. From 1815 to 1819. 1 vol.
 D. Chipman's Reports. From 1789 to 1825. 2 vols.
 Aiken's Reports. For 1826 and 1827. 2 vols.
 Vermont Reports. From 1826 to 1837. 9 vols.
 Shaw's Reports. From 1837 to 1839. 2 vols.
 Weston's Reports. From 1839 to 1840. 1 vol.

Massachusetts.

- Massachusetts's Reports. From 1804 to 1822. 17 vols.
 Pickering's Reports. From 1822 to 1840. 24 vols.
 Metcalf's Reports. From 1840 to 1844. 5 vols.

Connecticut.

- Kirby's Reports. From 1785 to 1788. 1 vol.
 Root's Reports. From 1789 to 1798. 2 vols.
 Day's Reports. From 1802 to 1810. 5 vols.
 Connecticut Reports. By Thomas Day. From June, 1814, to the present time. 14 vols.

New York.

- Coleman's Cases. From 1794 to 1800. 1 vol.
 Coleman and Caine's Cases. From 1794 to 1805. 1 vol.
 Caines's Reports. From 1803 to 1805. 3 vols.
 Caines's Cases. For 1804 and 1805. 2 vols.
 Johnson's Cases, 1799 to 1803. 3 vols.
 Johnson's Reports. From 1806 to 1823. 20 vols.
 Johnson's Chancery Reports. From 1814 to 1823. 7 vols.
 Cowen's Reports. From 1823 to 1828. 9 vols.
 Wendell's Reports. From 1828 to 1841. 26 vols.
 Hoffman's Reports. From 1839 to 1840. 1 vol.
 Hill's Reports. From 1841 to 1844. 5 vols.
 Whittlesey's Chancery Reports. From to . 1 vol.
 Hopkin's Chancery Reports. From 1823 to 1826. 1 vol.
 Paige's Chancery Reports. From 1828 to 1843. 9 vols.
 Yeates's Select Cases. Published in 1811. 1 vol.
 Anthon's Nisi Prius Cases. From 1808 to 1818. 1 vol.

Roger's New York City Hall Recorder. From 1816 to 1821. 6 vols.
 Wheeler's Criminal Cases. 3 vols.
 Hall's Reports for the years 1828 and 1829. 2 vols.
 Edward's Chancery Reports. From 1831 to 1842. 3 vols.

New Jersey.

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 Pennington's Reports. From 1806 to 1813. 2 vols.
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 Pennsylvania Reports. From 1829 to 1832. 3 vols.
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Delaware.

Harrington's Reports. From 1832 to 1839. 2 vols.

Maryland.

Harris and McHenry's Reports. From 1700 to 1799. 4 vols.
 Harris and Johnson. From 1800 to 1826. 7 vols.
 Harris and Gill. From 1826 to 1829. 2 vols.
 Gill and Johnson. From 1829 to 1840. 10 vols.
 Bland's Chancery Reports. From 1811 to 1830. 2 vols.

Virginia.

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 Washington's Reports. From 1790 to 1796. 2 vols.
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 Jefferson's Reports. From 1730 to 1772. 1 vol.
 Virginia cases. From 1789 to 1826. 2 vols.

North Carolina.

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 Haywood's Reports. From 1789 to 1806. 2 vols.
 Taylor's Reports. From 1789 to 1802. 1 vol.
 North Carolina Term Reports. From 1816 to 1818. 1 vol.
 Conference Reports, by Cameron and Norwood. From 1800 to 1804.
 1 vol.
 Murphey's Reports. From 1804 to 1819. 3 vols.
 Carolina Law Repository. From 1813 to 1816. 2 vols.
 Hawks' Reports. From 1820 to 1826. 4 vols.
 Devereux's Reports. From 1826 to 1834. 4 vols.
 Devereux's Equity Reports. From 1826 to 1834. 2 vols.
 Devereux and Battle's Reports. From 1834 to 1840. 4 vols. 3d
 and 4th vols. bound in one.
 Devereux and Battle's Equity Reports. From 1834 to 1840. 3 vols.
 Iredell's Law Reports. From 1840 to 1841. 1 vol.
 Iredell's Equity Reports. From 1840 to 1841. 1 vol.

South Carolina.

- Bay's Reports. From 1783 to 1804. 2 vols.
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 Constitutional Court Reports. For the year 1817. 2 vols.
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 Harper's Reports. For 1823 and 1824. 1 vol.
 Harper's Equity Reports. 1824. 1 vol.
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 Bailey's Reports. From 1828 to 1832. 2 vols.
 Hill's Reports. From 1833 to 1835. 2 vols.
 Hill's Chancery Reports. 2 vols.
 Rice's Reports. From 1838 to 1839. 1 vol.
 Rice's Chancery Reports. From 1838 to 1839. 1 vol.
 Brevard's Reports. From 1793 to 1816. 3 vols.
 Riley's Chancery Cases. From 1836 to 1837. 1 vol.
 Riley's Law Cases. 1836 to 1837. 1 vol.
 Cheves Reports. From 1839 to 1840. 1 vol.

Georgia.

- Charlton's (T. U. P.) Reports. Cases decided previous to 1810. 1 vol.
 Charlton's (R. M.) Reports. From 1811 to 1837. 1 vol.
 Dudley's Reports. From 1821 to 1833. 1 vol.

Alabama.

- Alabama Reports. From 1820 to 1826. 1 vol.
 Stewart's Reports. From 1827 to 1831. 3 vols.
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 Porter's Reports. From 1834 to 1839. 9 vols.
 Alabama Reports. New series. From 1840 to 1842. 3 vols.

Louisiana.

- Martin's Reports. From 1809 to 1823. 12 vols.
Martin's Reports. N. S. From 1823 to 1830. 8 vols.
Louisiana Reports. From 1830 to 1840. 16 vols.

Mississippi.

- Walker's Reports. From 1818 to 1832. 1 vol.
Howard's Reports. From 1834 to 1843. 7 vols.
Freman's Chancery Reports. 1 vol.

Tennessee.

- Overton's Tennessee Reports. From 1791 to 1815. 2 vols.
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Heywood's Reports. From 1816 to 1818. 3 vols.
Peck's Reports. From 1822 to 1824. 1 vol.
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Yerger's Reports. From 1832 to 1837. 10 vols.
Meigs's Reports. From 1838 to 1839. 1 vol.
Humphrey's Reports. From 1839 to 1841. 2 vols.

Kentucky.

- Hughes's Reports. From 1785 to 1801. 1 vol.
Kentucky Decisions. From 1801 to 1805. 1 vol.
Hardin's Reports. From 1805 to 1808. 1 vol.
Bibb's Reports. From 1808 to 1817. 4 vols.
Marshall's (A. K.) Reports. From 1817 to 1821. 3 vols.
Littel's Reports. From 1822 to 1824. 5 vols.
Littel's Select Cases. From 1795 to 1821. 1 vol.
Monroe's Reports. From 1824 to 1828. 7 vols.
Marshall's (J. J.) Reports. From 1829 to 1832. 7 vols.
Dana's Reports. From 1833 to 1840. 9 vols.

Ohio.

- Hammond's Ohio Reports. From 1821 to 1839. 9 vols.
Wright's Reports. From 1831 to 1834. 1 vol.
Wilcox's Ohio Reports. From 1840 to 1841. 1 vol.
Stanton's Ohio Reports. From 1842. 2 vols.
Tappan's Reports of Cases in Com. Pleas. From 1816. 1 vol.

Indiana.

- Blackford's Reports. From 1817, to the present time. 5 vols.

Illinois.

- Breese's Reports. From 1819 to 1830. 1 vol.
Scammon's Reports. From 1832 to 1840. 2 vols.

Missouri.

- Missouri Reports. From 1821 to 1840. 6 vols.

Arkansas.

- Pike's Reports. From 1837 to 1840. 2 vols.

3. LIST OF ENGLISH REPORTS, WITH REFERENCE TO
THE SUCCESSIVE SOVEREIGNS.

HENRY III.—(Oct. 19) 1216. (Nov. 16) 1272.

Jenkins, Ex., 4, 19, 21.

EDWARD I.—(Nov. 16) 1272. (July 7) 1307.

Jenkins, Ex., 18, 34.

Keilwey, K. B. and C. P. 6.

Year Book, K. B. C. P. and Exchequer, part 1.

EDWARD II.—(July 7) 1307. (Jan. 25) 1327.

Jenkins, Ex. 5, 15, 18.

Year Book, K. B. C. P. and Ex. part 1.

EDWARD III.—(Jan. 25) 1327. (June 21) 1377.

Benloe, K. B. and C. P. 32.

Jenkins, Ex. 1 to 47.

Keilwey, K. B. and C. P. 1 to 47.

Year Book, K. B. and C. P. part 2—1 to 10.

Year Book, K. B. and C. P. part 3—17, 18, 21 to 28, 38, 39.

Year Book, K. B. and C. P. part 4—40 to 50.

Year Book, part 5—Liber Assisarum, 1 to 51.

RICHARD II.—(June 21) 1377. (Sept. 29) 1399.

Bellewe, K. B. and C. P. 1 to 22.

Jenkins, Ex. 1 to 22.

HENRY IV.—(Sept. 29) 1399. (Mar. 20) 1413.

Jenkins, Ex. 1 to 14.

Year Book, K. B. and C. P. part 6—1 to 14.

HENRY V. (Mar. 20) 1413. (Aug. 31) 1422.

Jenkins, Ex. 1 to 10.

Year Book, K. B. and C. P. part 6—1, 2, 5, 7 to 10.

HENRY VI.—(Aug. 31) 1422. (Mar. 4) 1461.

Benloe, K. B. and C. P. 2, 18.

Jenkins, Ex. 1 to 39.

Year Book, K. B. and C. P. parts 7 and 8—1 to 4, 7 to 12, 14, 18 to 22, 27, 28, 30 to 39.

EDWARD IV.—(Mar. 4) 1461. (April 9) 1483.

Jenkins, Ex. 1 to 22.

Year Book, K. B. and C. P. part 9—1 to 22.

Year Book, K. B. C. P. and Ex. part 10—5.

EDWARD V.—(April 9) 1483. (June 22) 1483.

Jenkins, Ex.

Year Book, K. B. and C. P. part 11.

RICHARD III.—(June 22) 1483. (Aug. 22) 1485.

Jenkins, Ex. 1, 2.

Year Book, K. B. and C. P. part 11—1, 2.

HENRY VII.—(Aug 22) 1485. (April 22) 1509.

Benloe, K. B. and C. P. 1.

Jenkins, Ex. 1 to 21.

Keilwey, K. B. and C. P. 12, 13, 17 to 24.

Moore, K. B. C. P. Ex. and Chan. 1 to 24.

Year Book, K. B. and C. P. part 11—1 to 16, 10 to 24.

HENRY VIII.—(April 22) 1509. (Jan. 28) 1547.

Anderson, C. P. 25, &c.

Benloe, C. P. 1 to 38.

Benloe, (New) K. B. C. P. and Ex. 22, &c.

Benloe, Keilwey and Ashe, K. B. C. P. and Ex.

Brooke's New Cases, K. B. C. P. and Exchequer.

Dalison, C. P. 38.

Dyer, K. B. C. P. Ex. and Chan. 4, &c.

Jenkins, Ex. 1 to 38.

Keilwey, K. B. and C. P. 1 to 11, and 21.

Moore, K. B. C. P. Ex. and Chan. 3.

Year Book, K. B. and C. P. part 11—13, 14, 18, 19, 26, 27, 29 to 38.

EDWARD VI.—(Jan. 28) 1547. (July 6) 1553.

Anderson, C. P. 1 to 6.

Benloe and Dalison, C. P. 2.

Brooke's New Cases, K. B. C. P. and Ex.

Benloe (New) K. B. C. P. and Ex. 1 to 6.

Dyer, K. B. C. P. Ex. and Chan. 1 to 6.

Jenkins, Ex. 1 to 6

Moore, K. B. C. P. Ex. and Chan. 1 to 6.

Plowden, K. B. C. P. and Exchequer, 4 to 6.

MARY.—(July 6) 1553. (Nov. 17) 1558.

Anderson, C. P. 1 to 6.

Benloe and Dalison, C. P. 1 to 5.

Benloe in Keilwey and Ashe, K. B. C. P. and Ex. 1 to 5.

Benloe, (New) K. B. C. P. and Ex. 1 to 5.

Brooke's New Cases, K. B. C. P. and Ex. 1 to 5.

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Dyer, K. B. C. P. Ex. and Chan. 1 to 5.

Dalison, in Keilwey and Ashe, C. P. 1, 4, 5.

Jenkins, Ex. 1 to 5.

Leonard, K. B. C. P. and Ex. 1 to 5.

Owen, K. B. and C. P. 4, 5.

Plowden, K. B. C. P. and Ex. 1 to 5.

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Benloe in Keilwey and Ashe, K. B. C. P. and Ex. 2 to 20.

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 Benloe, C. P. 1 to 21.
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 Coke, K. B. C. P. Ex. and Chan. 14 to 45.
 Croke, K. B. and C. P. 24 to 45.
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 Dyer, K. B. and C. P. 1 to 23.
 Godbolt, K. B. &c. 17 to 45.
 Goldesborough, K. B. &c. 28 to 31, 39 to 43.
 Hobart, K. B. &c. a few cases.
 Hutton, C. P. 26 to 38.
 Jenkins, Ex. 1 to 45.
 Leonard, K. B. C. P. and Ex. 1 to 45.
 Moore, K. B. C. P. Ex. and Chan. 1 to 45.
 Noy, K. B. and C. P. 1 to 45.
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